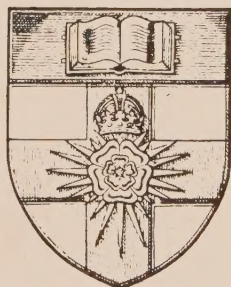


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AND

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[These Reports will be cited as follows :—[1917] 2 I. R.]

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CORRIGENDA.

- Page 7, second line of catch-word, for "5 & 6 Geo. 4, c. 104" read "5 & 6 Geo. 5, c. 104".
- „ 22, in reference No. (4) read "*Rex (Rea) v. Davison*, [1913] 2 Ir. R. 342".
- „ 68, line 17, for "contractural" read "contractual".
- „ 76, „ 16, for "do" read "does".
- „ 163, in reference, for "20 Ch. D. 169" read "26 Ch. D. 169".
- „ 164, line 8, after "*Scrace v. Whittington*" insert "(2)".
- „ „ „ 15, for "(2)" read "(3)".
- „ „ in reference (3) read "6 Ir. Jur. O. S. 53".
- „ 240, line 11, after "Shops" omit full stop, and for "title" read "cited".
- „ 602, in reference, for "117" read "107".

MEMORANDA.

The RIGHT HON. R. R. CHERRY having resigned the Office of Lord Chief Justice on 22nd day of December, 1916, the RIGHT HON. JAMES H. M. CAMPBELL was, on 10th day of January, 1917, appointed thereto, and was subsequently created a Baronet.

On 27th November, 1917, WILLIAM MOORE K.C. was appointed a Judge of the King's Bench Division in Ireland.

On 11th January, 1917, JAMES O'CONNOR K.C. was appointed His Majesty's Attorney-General for Ireland.

On 30th March, 1917, JAMES CHAMBERS K.C. was appointed His Majesty's Solicitor-General for Ireland. He died on the 11th day of June, 1917.

On 17th September, 1917, ARTHUR WARREN SAMUELS K.C. was appointed His Majesty's Solicitor-General for Ireland.

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C A S E S

DETERMINED BY

THE KING'S BENCH DIVISION

OF

THE HIGH COURT OF JUSTICE IN IRELAND,

AND ON APPEAL THEREFROM IN

THE COURT OF APPEAL,

AND BY

THE COURT FOR CROWN CASES RESERVED.

1917.

THE KING (COUNTY COUNCILS NORTH RIDING AND SOUTH RIDING, COUNTY TIPPERARY) *v.* ST. JOHN
CONSIDINE, L. G. B. AUDITOR (1). *K. B. Div.*
1916.
June 6, 15.

*Certiorari and Mandamus—Certiorari inapplicable—Audit of Accounts—
Discretion—Form of Mandamus.*

The function of an auditor in examining and passing the accounts of a District Asylum for the purpose of the capitation grant under sect. 58 of the Local Government (Ireland) Act, 1898 (61 & 62 Vict. c. 37), is ministerial or administrative, and not judicial. Such audit cannot be the subject of *certiorari* unless made so by statute.

No writ of *mandamus* can issue to an auditor on such audit, as the auditor can neither be directed to revise the accounts in accordance with the applicant's interpretation of rights, nor be directed to hear and determine, as he has already done so.

Where an auditor in such audit misunderstands or misapplies an enactment to the prejudice of some person interested in the audit, the proper remedy is a substantive action. Error in decision either on legal merits or on a statute cannot be reviewed on *mandamus*.

R. (O'Ferrall) v. Sheehan, [1898] 2 I. R. 683; *R. (Wexford C. C.) v. L. G. B.*, [1902] 2 I. R. 349; *R. (Martin) v. Mahony*, [1910] 2 I. R. 695; considered and applied.

(1) Before CHERRY L.C.J., GIBSON and DODD JJ.

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1916.

CERTIORARI AND MANDAMUS.

REX
(CLONMEL
ASYLUM
COMMITTEE)
v.
CONSIDINE.

Motion to make absolute a conditional order for a writ of certiorari to bring up and quash the certificate dated the 1st November, 1915, of Mr. St. John Considine, Local Government auditor, issued on the audit of the accounts of the prosecutors for the year ending 31st March, 1915, and for a mandamus to the auditor, to issue a certificate in accordance with law.

The prosecutors had borrowed sums of money for buildings for the accommodation of lunatics in their district asylum, and in the financial year ending 31st March, 1916, had paid the sum of £2,570 4s. in principal and interest in respect of these loans. In making their return for the purpose of the capitation grant for the maintenance of lunatics under sect. 58, sub-s. 2 (c), of the Local Government (Ireland) Act, 1898 (61 & 62 Vict. c. 37), the prosecutors calculated this repayment at £2 19s. 11d. per lunatic inmate, and returned this calculation as an item of the expenditure on which the average cost of maintenance of the lunatics was based. Mr. Considine, in his audit, disallowed and struck out the items of expenditure which were for the above repayment of loans, and thus decreased the average cost of maintenance. Under the Local Government Act, 1898, where the annual average cost of the maintenance of pauper lunatics has been ascertained, the district asylum is entitled to a capitation grant per lunatic of one half such annual average cost, on the basis of so much per week, or 4s. a week per head if such half sum as above amounts to more than 4s. per week per head.

The reduction effected by the auditor's certificate amounted to about £51 0s. 4d.

The grounds upon which it was sought to quash the auditor's certificate were the following:—"That the Order of the Inspectors of Lunatics in Ireland dated the 19th March, 1900, as amended by the Order of the said Inspectors dated the 20th March, 1902, under which the said certificate purported to be made, was made without and in excess of jurisdiction, and is *ultra vires* and void, because (a) the Local Government Board, under whose order entitled 'The Asylums Books and Records Order, 1899,' the said orders of the Inspectors of Lunatics in Ireland purport to be made,

had no power to delegate to any body of persons the power to make the said orders; because (b) the said order of 1899 did not make such delegation; because (c) the said order of 1899 was repealed by the Public Bodies Order, 1904; because (d) the said orders, as amended, of the Inspectors of Lunatics in Ireland, purported to legislate contrary to sect. 58, sub-s. 2 (c), of the Local Government (Ireland) Act, 1898.

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"2. That the net charge referred to in sect. 58, sub-s. 2 (c), of the Local Government (Ireland) Act, 1898, was determined by the said order, and by the said auditor in his said certificate, on a wrong basis and contrary to law."

Arguments and authorities were addressed and cited to the Court on the above grounds, but are immaterial in view of the judgment.

Clancy K.C. (with him *Muldoon K.C. & Ronayne*), for the prosecutors.

The Attorney-General (Right Hon. J. H. M. Campbell K.C.) and *Wylie K.C.* (with them *Wood*), for the Local Government Board.

The judgment of the Court was delivered by Gibson J.

GIBSON J. :—

This motion for certiorari and mandamus, in respect of Mr. Considine's audit, has been brought forward for the purpose of getting a decision as to the amount of capitation grant that should be allowed under sect. 58, sub-s. 2 (c), of the Local Government Act, 1898. The accounts laid before him were on the basis that in that section cost of maintenance included the instalments for principal and interest on loans for building purposes, purchase of lands, &c. The auditor revised the accounts on the view that such capital expenditure was not included in maintenance. The orders of the inspectors, sanctioned by the Local Government Board, which the auditor followed cannot, having regard to sect. 9, sub-s. 5, of the Act, be taken as binding, and the question depends on the true construction of sect. 58, sub-s. 2 (c). It is admitted that before 1898 capital outlay was not included in maintenance, and the Attorney-General argues (to my mind with much force) that the section displays no intention to change the law in that respect; it

K. B. Div. reproduces, he urges, in consolidated form the existing relation and rights as to capitation. It occurred, however, to the Court, after 1916. the matter had been opened, that the action of the auditor was *REX* one to which the remedy of certiorari or mandamus might not be *(CLONMEL ASYLUM COMMITTEE)* applicable, and the case was adjourned to enable that point to be *v.* separately argued. If there was no jurisdiction, it would be *CONSIDINE.* plainly improper for the Court to express an opinion obiter on a question which should be determined in an action. In such action the Attorney-General necessarily would be a party. As we have come to the conclusion that the application before us is untenable, we abstain from offering any opinion on the substantial controversy.

Gibson J.

The application is addressed to the general jurisdiction of the Court on the assumption that the audit was of a judicial character and affected rights; it is not in any way based on the special statutory audit jurisdiction applicable where any person is particularly interested or aggrieved. If a public body might be such a person, and if the procedure prescribed by the Local Government Board Order, 1904, had been followed, and the present case could have been brought within it, the question might have been possibly different. But as neither the Local Government Board Order, nor the provisions of our Judicature Order LXXXIV, Rule 17 A (as to certiorari under the Acts of 1871, 1898, and 1902 respectively) ("Dublin Gazette," 17th March, 1911, vol. i, p. 473), have been complied with, the point does not arise or require consideration.

The function of an auditor in examining and passing accounts of the present type is ministerial or administrative, not judicial. Such accounts are quite different from accounts passed by quarter sessions, on which fiscal orders are made, as in the *Winsford Case* (1), and *Saunders's Case* (2). Incidentally the auditor may be obliged to determine legal matters provisionally for the immediate purpose in hand; but his action binds no one, and does not preclude persons who may be prejudiced from vindicating their rights. That such audit is not the subject of certiorari was expressly decided in *Sheehan's Case* (3). That case, cited in Vanston (p. 838), was recognized as good law, and as not affected by the Local Government legislation, by Palles C.B. in the *Wexford Case* (4).

(1) 13 Q. B. 873.

(2) 3 E. & B. 763.

(3) [1898] 2 I. R. 683.

(4) [1902] 2 I. R., at p. 374.

The Act of 1898 does not alter the essential quality of the auditor's function, though the Order of 1904 lays down the procedure to be followed, subject now to the restrictions of the Judicature Order LXXXIV, Rule 17A.

If the auditor is wrong in a view of law, his view does not conclude the person aggrieved from getting redress in a suit. The cases of *Tynemouth Corporation v. Attorney-General* (1), and *Attorney-General v. De Winton* (2), are authorities on this; also *Attorney-General v. Barrett* (3). As to the nature of such suit, *Eastern Trust Co. v. Mackenzie & Co., Ltd.* (4); *Dyson v. Attorney-General* (5), and *Burgess v. Attorney-General* (6) afford guidance.

Mr. Clancy's contention that certiorari is only specially provided where an alternative appeal is given to some other body, such as the Local Government Board, and that no argument can be deduced from the express creation of limited certiorari adverse to the existence of certiorari on common-law principles, is unfounded in fact and law. Thus in *Borough Fund certiorari* under 7 Will. IV, and 1 Vict. c. 78, s. 44, no appeal is given in addition to certiorari. There are many other examples. No instance has been cited where common-law certiorari has ever been applied to audits generally. The absence of authority is a weighty argument. The opinion of Lord Campbell in *R. v. Hunt* (7) that certiorari against an audit requires an express enactment, stating it as the established practice, could not be overlooked by Parliament. When it allowed an express restricted right in certain cases, it could have hardly intended that certiorari of an unlimited character, not subject to conditions, was to be available against all audits. The English and Irish Statutes on the subject were discussed by me in *Sheehan's Case* (8). None gives any support to Mr. Clancy's proposition.

Supposing, however, that certiorari was here a theoretically proper remedy, the issue of the writ would be plainly discretionary. The delay and considerations emphasized by Order LXXXIV, Rule 17A, the inconvenience and confusion that would be caused,

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(1) [1899] A. C., at p. 305.

(2) [1906] 2 Ch., at pp. 118, 119.

(3) I. R. 3 Eq. 392.

(4) [1915] A. C., at p. 759.

(5) [1911] 1 K. B. 410.

(6) [1912] 1 Ch. 173.

(7) 6 E. & B., at p. 411.

(8) [1898] 2 I. R. 683.

K. B. Div. and the existence of a preferable remedy by action, in which the
 1916. Attorney-General would be a party, and there could be an appeal
 REX to the House of Lords, would make it, in my opinion, proper to
 (CLONMEL refuse the writ in the exercise of sound judicial discretion. A
 ASYLUM claim by a public body, resisted by the State, against public money,
 COMMITTEE) is hardly appropriate to be decided by certiorari, which would not
 v. bind future rights or preclude the Attorney-General from bringing
 CONSIDINE. a declaratory suit, such as was considered in the cases already
 Gibson J. cited. Even the decision on a judicial audit would have no
 such conclusive effect: *Attorney-General v. De Winton* (1), and
 cases already referred to.

Nor is any right to mandamus established. Though that writ may command the doing of a particular obligatory act by a ministerial functionary, it never, when addressed to a judicial person, orders any particular form of decision; it is always limited to requiring him to hear and determine. Hence, if the auditor was quasi judge, he could not be directed to revise the accounts in accordance with the applicants' interpretation of their rights. A mandamus in the appropriate form, that is to hear and determine, is equally impossible. The auditor has already done so. If he has misunderstood the enactment to the prejudice of the applicants, which I am far from saying, we have no jurisdiction as an appeal court to correct his error. This is settled by an unbroken series of authorities, some noticed in *Mahony's Case* (2), to which I may add *Ex p. Lewis* (3), and the *Middlesex Justices Case* (4). Error, in a decision on the legal merits, whether on a statute or otherwise, cannot be reviewed on mandamus if the auditor is acting as judge, as Mr. Clancy insists he is. It is only when the tribunal goes into matters which it cannot consider that it can be directed to hear and determine.

Nor is mandamus allowed where there is another and equally effective and convenient remedy such as here exists.

Both branches of the application therefore fail, and the conditional order must be discharged.

Solicitors for the prosecutors: *J. J. O'Shee & Co.*

Solicitors for the Local Government Board: *T. T. Meccredy & Son.*

C. N. K.

(1) [1906] 2 Ch. 106.

(3) 21 Q. B. D. 191.

(2) [1910] 2 I. R., at p. 741.

(4) 2 Q. B. D. 510.

THE KING *v.* JOHN JONES (1).

Habeas Corpus—Absentee from Military Service—Military Service Act, 1916 K. B. Dw.
 (5 & 6 Geo. 4, c. 104); *Army Act, 1881* (44 & 45 Vict. c. 58); *Reserve* 1916.
Forces Act, 1882 (45 & 46 Vict. c. 48)—*Jurisdiction of Justices to* Nov. 9, 10,
commit Deserter to Military Custody. 15.

To justify an order committing to military custody a person charged as a suspected deserter under the Army Act, 1881, c. 58, sect. 154, or charged as an absentee, being ordinarily resident in Great Britain on August 15, 1915, under 5 & 6 Geo. 5, c. 104, section 1, the Court of Summary Jurisdiction must be satisfied that such person is a deserter or is so ordinarily resident. It is not enough that, without being itself satisfied of such fact, the Court should decide that there was a *prima facie* case proper for the consideration and decision of another tribunal.

Held, that an order committing to military custody a person charged as an absentee under 5 & 6 Geo. 5, c. 104, section 1, was invalid, as the Court did not decide that it was satisfied as to such person being ordinarily resident in Great Britain on August 15, 1915.

Held also, that habeas corpus was an appropriate remedy for a person in military custody under such invalid order.

Quære: (1) Whether an order committing to military custody can be made by a single magistrate under the Army Act, 1881, c. 58, sect. 154, or under 5 & 6 Geo. 5, c. 104, sect. 1;

(2) as to the effect of an order committing to military custody in determining the status of the person charged;

(3) as to the form of such order.

Walder v. Turner, 33 T. L. R. L., and *Ferguson's Case* (unreported) discussed and distinguished.

MOTION to make absolute a conditional order for a writ of habeas corpus directed to Colonel Sir Anthony Weldon, Bart., commanding His Majesty's Forces at Limerick, to bring up the body of John Jones and the day and cause of his detention.

The prosecutor, John Jones, in June, 1914, left Kiltelly in the county of Limerick, where his parents resided, and went to London, where he resided from June, 1914, till December, 1915, at 35 North Side, Clapham Common. During his residence in London he was employed, as he alleged, temporarily with the Prudential Insurance Company. He left this employment and London in December, 1915, and returned to his parents at

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K. B. Div. Killeely, where he resided from the time of his return until his
1916. arrest.

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On the 27th January, 1916, the Military Service Act (5 & 6 Geo. 5, c. 104) came into operation, and under its provisions the prosecutor if "ordinarily resident" in Great Britain on the 15th August, 1915, became, if of military age and not exempt, attached to the reserve of His Majesty's forces. At the crucial date, 15th August, 1915, the prosecutor was in residence at North Side, Clapham Common, and from the certificate of his registration under the National Registration Act, 1915, it appeared that he was, in 1915, twenty-two years of age and unmarried. In that certificate the house where he then was living was given as his "permanent postal address."

On the 8th March, 1916, by a proclamation under the Military Service Act, 1916, persons in the Wandsworth sub-area made liable to service by that statute were called up. It was admitted that, if he was liable to service under this enactment, the prosecutor should have reported himself to the military authorities at Wandsworth.

On the 11th September, 1916, the prosecutor was arrested by the police at Killeely on the charge of "unlawfully absenting himself from the reserve forces of Wandsworth sub-area," and on the following day he was brought before the resident magistrate in the police barracks. The resident magistrate, Mr. St. George, then made the following order:—

"Depositions taken and case adjourned to 19th September, 1916, at 11 a.m. at New Pallas Courthouse, defendant admitted to bail."

This order was duly entered in the petty sessions book and signed by the resident magistrate, but there was no entry made that it was an order made out of petty sessions.

On the 19th September the prosecutor appeared at New Pallas courthouse. The resident magistrate and three justices were present. On behalf of the Crown it was contended that Mr. St. George could by himself consider and decide the case; on behalf of the prosecutor it was argued that the case could only be heard and determined by a Court of Summary Jurisdiction, and that the resident magistrate sitting by himself could not be such

court. Mr. St. George ruled against the contention of the prosecutor, but adjourned the case to consider the matter. After several adjournments the case finally came on at Pallas courthouse on the 31st of October, 1916. This was not the date of the ordinary petty sessions, but other justices attended. The Crown again argued that Mr. St. George could alone dispose of the case, and on behalf of the prosecutor it was again argued that the case must be decided by a Court of Summary Jurisdiction. Mr. St. George ruled against the latter contention, and, excluding the other justices, proceeded to take depositions. The case made by the prosecutor's witness was, that his employment in London was merely temporary, and was undertaken with a view to obtain experience, and to qualify for an appointment in Dublin. Mr. St. George stated it was not a part of his duty to decide the guilt or innocence of the prosecutor, and that he would do no more than satisfy himself that a *prima facie* case had been established against the prosecutor. At the close of the depositions he stated that he was satisfied that such *prima facie* case had been established, and made the following order:—

“Informations taken and the defendant remanded in custody for eight days or sooner if called for by a military escort.”

On the 2nd November, 1916, the prosecutor was taken into military custody at Limerick.

The following are the material portions of the statutes referred to in the argument or judgment:—

5 & 6 Vict. c. 12:—s. 22—It shall be lawful for the constable of any place where any person reasonably suspected to be a deserter shall be found, or in any adjoining place, and if no such constable can be immediately met with, then for any officer or soldier in Her Majesty's service to apprehend, or cause such suspected person to be apprehended, and to cause him to be brought before any justice living in or near such place and acting for the same or any adjoining county, who hath hereby power to examine such suspected person; and if by his confession, or the testimony of one or more witnesses upon oath, or by the knowledge of such justice it shall appear that such suspected person is a soldier and ought to be with the corps to which he belongs, such justice shall forthwith cause him to be conveyed to some public prison in such place, or if there be no public prison in such place, then, at the discretion of such justice of the peace, to the nearest or most convenient public prison in the same or any next adjoining county, or to the Provost Marshal, in

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case such deserter shall be apprehended within the city or liberties of Dublin or places adjacent, or if such deserter shall be apprehended by any party of soldiers of his own regiment, or shall be apprehended in the vicinity of the headquarters or of any depot of the regiment to which he shall belong, then such justice may deliver such deserter to the party of his regiment, or may order such deserter to be taken to the headquarters or depot of the regiment to which he belongs, instead of committing him to prison, and such justice shall transmit an account thereof, in the form prescribed in the schedule annexed to this Act, to the Secretary at War, specifying at the foot thereof the commitment to prison or delivery of such deserter to the party of his regiment in [*sic* ? or] order for his being taken to the headquarters or depot of his regiment as the case may be, to the end that such person may be removed by an order from the office of the Secretary at War and proceeded against according to law." [See also 10 Geo. 4, c. 6, sect. 21.]

Army Act, 1881, 44 & 45 Vict. c. 58.—

Sect. 12:—(1) Every person subject to military law who commits any of the following offences; that is (*a*) deserts or attempts to desert His Majesty's service shall on conviction by courtmartial if he committed such an offence when on active service or under orders for active service, be liable to suffer death or such less punishment as in this Act mentioned; and if he committed such offence under any other circumstances, be liable for the first offence to suffer imprisonment.

Sect. 15.—Every person subject to military law who (1) absents himself without leave shall, on conviction by courtmartial, be liable, if a soldier, to suffer imprisonment or such less punishment as in this Act mentioned.

Sect. 45 (1).—Every person subject to military law when so charged (with an offence punishable under the Act) may be taken into military custody.

Sect. 154.—With respect to deserters the following provisions shall have effect:—

(1) Upon reasonable suspicion that a person is a deserter, it shall be lawful for any constable, or if no constable can be immediately met with, then for any officer or soldier or other person, to apprehend such suspected person, and forthwith to bring him before a court of summary jurisdiction.

(3) Where a person is brought before a court of summary jurisdiction charged with being a deserter under this Act, such Court may deal with the case in like manner as if such person were brought before the Court charged with an indictable offence.

(4) The Court, if satisfied either by evidence on oath, or by the confession of such person that he is a deserter, shall forthwith, as it may seem to the Court most expedient with regard to his safe custody, cause him either to be delivered into military custody, in such manner as the Court may deem most expedient, or until he can be so delivered, to be committed to some prison, police station, or other place legally provided for the confinement of persons in custody for such reasonable time as appears to the Court reasonably necessary for the purpose of delivering him into military custody.

Sect. 166 (1). A court of summary jurisdiction having jurisdiction in the place where the offence was committed, or in the place where the offender may for the time being be, shall have jurisdiction over all offences triable in a civil court under this Act, except any such offence as is declared by this Act to be a misdemeanour.

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(5) The court of summary jurisdiction in Ireland, when hearing and determining a case arising under this Act, shall be constituted either of two or more justices sitting at some Court or public place at which justices are for the time being accustomed to assemble for the purpose of holding petty sessions, or of some magistrate or officer sitting alone or with others at some Court or other place appointed for the public administration of justice, and for the time being empowered by law to do alone any act authorized to be done by more than one justice of the peace.

Sect. 190 (34). The expression, "Summary Jurisdiction Acts" (c), as regards Ireland means within the police district of Dublin metropolis, the Acts regulating the powers and duties of justices of the peace for such district, or of the police of such district; and elsewhere in Ireland, the Petty Sessions (Ireland) Act, 1851, and any Act amending the same.

(35). The expression, "Court of Summary Jurisdiction" (b), as regards Ireland, means any justice or justices of the peace, police magistrates, stipendiary or other magistrate, or officer, by whatever name called, to whom jurisdiction is given by the Summary Jurisdiction Acts or any Acts therein referred to.

Reserve Forces Act, 1882 (45 & 46 Vict. c. 48):—

Sect. 15 (1). When a man belonging to the army reserve is called out for annual training, or on permanent service, . . . and such man, without leave lawfully granted, or such sickness, or other reasonable excuse, as may be allowed in the prescribed manner, fails to appear at any time and place at which he is required upon such calling out to attend, he shall (a), if called out on permanent service, . . . be guilty, according to the circumstances, of deserting within the meaning of sect. 12, or of absenting himself without leave within the meaning of sect. 15 of the Army Act, 1881.

(2). A man belonging to the army reserve, who commits an offence under this section, or under sect. 12, or sect. 15, of the Army Act, 1881, whether otherwise subject to military law or not, shall be liable as follows, that is to say (a), be liable to be tried by court martial, and convicted and punished accordingly; or (b) be liable to be convicted by a court of summary jurisdiction, and to be sentenced to a fine of not less than 40s., and not more than £25, and in default of payment to imprisonment, with or without hard labour, for any term not less than seven days, and not more than the maximum term allowed by law for the non-payment of the fine; and may in any case be taken into military custody.

16 (1). Sect. 154 of the Army Act, 1881, shall apply to a man who is a deserter or absentee without leave from the army reserve within the meaning

A. B. Div. of this Act in like manner as it applies to a deserter in that section mentioned,
 1916. and a man who under that section is delivered into military custody, or
 committed for the purpose of being so delivered, may be tried as provided by
 this Act.

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Military Service Act, 1916 (5 & 6 Geo. 5, c. 104):—

Sect. 1 (1). Every male British subject who, (a) on the 15th day of August, 1915, was ordinarily resident in Great Britain, and had attained the age of eighteen years, and had not attained the age of forty-one years; and (b) on the 2nd day of November, 1915, was unmarried, or was a widower without any child dependent on him, shall, unless he is within the exceptions set out in the first schedule to this Act, or has attained the age of forty-one years before the appointed date, be deemed as from the appointed date to have been duly enlisted in His Majesty's regular forces for general service with the colours, or in the reserve for the period of the war, and to have been forthwith transferred to the reserve.

(2). The Army Act (with the exception of sect. 96 thereof, which relates to the claims of masters to apprentices) and the Reserve Forces Acts, 1882 to 1907, and any orders and regulations made thereunder, shall apply accordingly to any man who is so deemed to have been enlisted and transferred to the reserve; and if any question arises in any legal proceeding under any of those Acts, orders, or regulations, whether any man is a man, who is under this section deemed to have been enlisted and transferred to the reserve or not, the Court may require the man to give evidence on the question, and if satisfactory evidence is not given to the contrary, the man shall be deemed to have been so enlisted and transferred; provided that (a) where the question whether a man is a man who, under this section is deemed to have been enlisted and transferred to the reserve or not, is raised on proceedings in respect of an offence alleged to have been committed by the man as a member of the reserve, whilst he was a member of the reserve in pursuance of the transfer under this Act, or in respect of any alleged failure to comply with any order calling him up from the reserve for permanent service, that question shall be decided only on proceedings before a civil Court; and (b) no such proceedings shall be instituted except during the continuance of the present war and a period of six months thereafter; and (c) a man who is deemed to have been enlisted and transferred to the reserve under this section shall not be liable to suffer death in respect of failure to obey an order calling him up from the reserve for permanent service.

Serjeant M'Sweeny (with him *Rearden*), for the prosecutor:— *K. B. Div*

The order for the committal of the prosecutor is bad—(a) because the proceedings on which it is founded were *coram non judice*; (b) because there is no declaration that the magistrate determined as a fact that the prosecutor was a deserter; in fact, it is admitted that he did not so find.

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The Court to which jurisdiction under sect. 154 of the Army Act, 1881 (44 & 45 Vict. c. 58), is given is a "summary jurisdiction Court," and that section provides that there shall be a determination before committal to military custody. A single magistrate, sitting in a police barrack, could not be a Court of Summary Jurisdiction: *Quinn v. Pratt* (1); and the Resident Magistrate could never have seisin of the case. In any event the Court to determine is a Court consisting of two or more justices: Petty Sessions (Ireland) Act (14 & 15 Vict. c. 93); Army Act, 1881 (44 & 45 Vict. c. 58), sects. 166, 190.

Sect. 154, sub-s. 4, of the Army Act, 1881 (44 & 45 Vict. c. 58), provides a condition going to jurisdiction in cases where a suspected deserter is delivered into military custody. It provides that the Court must be satisfied that the suspected person is a soldier before it delivers him to military authority. Assuming Mr. St. George had power to act as a Court, the order does not show that he fulfilled this condition; in fact, it is admitted he did not, and, therefore, the order is bad on its face.

The only power of committal into military custody, except in case of persons who are in fact subject to military law, is under sect. 154, sub-s. 4, of the Army Act, 1881. Once a man was properly in military custody he could, under the old law, be tried either by civil or military tribunal: Reserve Forces Act, 1882 (45 & 46 Vict. c. 58), sect. 16; but now, in cases under the Military Service Act, 1916 (5 & 6 Geo. 5, c. 104), the guilt or innocence of the accused can only be tried by a civil Court. The function of the Court in determining the status of the person remains under sect. 154, sub-s. 4, of the Army Act, 1881 (44 & 45 Vict. c. 58); but there must be a clear finding before the subject is delivered into military custody. That finding does not conclude

K. B. Div. his guilt or innocence in the sense that he may still show before
 1916. the tribunal that tries him that his absence was excusable. Here
 REX there was no Court to determine, and, if there was a Court, it
 v. never determined, that the prosecutor was "ordinarily resident"
 JONES. in Great Britain on the crucial date.

Denis Henry K.C. (and Cusack), for the Crown:—

The jurisdiction exercised by the magistrate was that conferred by sub-s. 3 of sect. 154 of the Army Act, 1881. He dealt with the case as if he were dealing with an indictable offence. His order does not prejudice the prosecutor, as the right of the latter to have his status determined is still alive. *Walder v. Turner* (1) is an express authority for the procedure here adopted. Sect. 190 of the Army Act, 1881, expressly defines a Court of Summary Jurisdiction as any justice or justices, etc. We admit that, if there were a trial of issues, Mr. St. George could not alone adjudicate. But there has been no trial; there has been the preliminary inquiry authorized by sect. 154, sub-s. 3, of the Army Act, 1881. Formerly the issue of desertion could be tried by a civil or military tribunal, at the election of the military. Under the Military Service Act, 1916, where the question of desertion depends upon the status of the accused, the issue must be determined by a civil Court.

[Counsel referred to *R. (Blakeney) v. Roscommon JJ.* (2), and *R. v. Ferguson* (3).]

Rearden, in reply:—

Cur. adv. vult.

The judgment of the Court was delivered by Gibson J.

GIBSON J.:—

The question before us is as to the legality of custody by the military of John Jones, who was apprehended by a police officer, and brought before Mr. St. George, who remanded him on several occasions, until he made the order which is alleged to justify the detention. The remands were duly entered in the petty sessions book. Throughout Mr. St. George appears to have treated the case as one of ordinary indictable offence, which, having originated

(1) 33 T. L. R. 1. (2) [1894] 2 I. R. 158. (3) Unreported.

before him, was within his exclusive seisin. The order was not made on the usual petty sessions day, and, though other justices were present, they took no part in the decision. The complaint on which the original arrest took place was not questioned as being wrong in form. It was as follows:—“Complaint that the defendant, on the 8th March, 1916, at Wandsworth, in the County of Surrey, England, did unlawfully absent himself from the Reserve Forces of the Wandsworth sub-area, contrary to the statute.” The order now impugned was made under sect. 154, sub-s. 4, of the Army Act, 1881. It is dated the 31st October, 1916, and runs as follows:—

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“Information taken and the defendant remanded in custody for eight days, or sooner if called for by a military escort.”

The dispute which Jones contends he was entitled to have decided by a civil Court, as defined by sect. 190 of the Army Act, 1881, was as to whether he was ordinarily resident in Great Britain on the 15th August, 1915. His case was that he was only temporarily resident there for a special purpose. The evidence on both sides is contained in depositions taken on the 31st October, 1916, when the order was made.

The discussion has extended over a wide range of topics, argued or indicated for consideration, many of which it is not necessary now to determine. What is the nature of the jurisdiction created by sect. 154 of the Army Act? What is the effect of an order made under that section? Can a justice act by himself, or must there be two justices to constitute the Court of Summary Jurisdiction? Can one justice exclude other justices? If so, under what circumstances? What is the construction or operation of sect. 1, sub-s. 2, of the Act 5 & 6 Geo. 5, c. 104? It requires, that in any legal proceedings under any of the Army Acts the Courts may require the man to give evidence on the question, and, in the absence of satisfactory evidence the man shall be deemed to have been enlisted and transferred. Sub-s. 2 (a) directs that where the question of liability is raised on proceedings in respect of an offence alleged to have been committed (amongst others) in respect of any alleged failure to comply with any order calling up, that question is to be decided only on proceedings before a civil Court. Was there evidence sufficient to support the order? If there was not, could the evidence be examined?

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The main question argued by Mr. Henry K.C. was the construction of sect. 154, sub-ss. 3 and 4, of the Army Act, which, according to him, conferred jurisdiction substantially the same in its mode of exercise, purpose, and results, as the jurisdiction possessed by a justice dealing with a criminal prosecution which he is asked to return for trial. He referred to the *Roscommon Case* (1), particularly the judgment of Holmes J., as explaining the nature of the magisterial function in discharging that duty. From the reasoning in that case it may be that not only certiorari but habeas corpus might be inapplicable as a remedy for a person returned for trial. Such persons could get bail without now applying for habeas corpus, the procedure formerly adopted.

I now turn to the Army Act, 1881. Where a person subject to military law deserts, he commits an offence under sect. 12, and may be arrested under sect. 45. If, however, from mistake of identity or otherwise the person arrested as deserter was not subject to military law, the arrest would be wrongful and would support an action: *Comyn v. Sabine* (2). With regard to persons suspected of being deserters, sect. 154 prescribes procedure which has the double effect of protecting the subject and the military authority, and enables the controversy to be, for the time at least, dealt with. The statute 5 & 6 Vict. c. 12, since repealed, sect. 22 (which probably reproduces the phraseology of the old Mutiny Acts, such as the statute 34 Geo. 3), not mentioned in argument, throws light on the probable object and effect of sect 154. Sect. 22 dealt with the same kind of suspected deserter; it gave power of apprehension in the same way; the prisoner was to be brought before a justice; the latter might examine him; if it should appear by confession, evidence, or by the justice's own knowledge that the prisoner was a soldier, the justice was to cause him to be conveyed to prison, save in certain cases, in some of which he had a discretion as to military custody; and the justice was to send an account in prescribed schedule form to the War Secretary. The heading of the schedule form of account was: "Committed to confinement

(1) [1894] 2 I. R. 158.

(2) 1 Smith L. C., p. 633, 6th ed.

at as a deserter from the Regiment." The form *K. B. Div.*
 contains a space to be filled in with particulars of the evidence 1916.
 founding the committal. The case of *Re Douglas* (1) is the only REX
 decision that I am aware of on this enactment. It was decided in v.
 favour of Captain Douglas on the ground of the insufficiency of JONES.
 the return to the habeas corpus. *Re Douglas* (1) is instructive Gibson J.
 from the fact that habeas corpus was allowed (not possibly now an
 appropriate remedy according to the reasoning in the *Roscommon*
Case (2) in respect of committal for trial in an indictable case).
 The form of the return and warrant and the argument of Mr. Kelly,
 counsel for Captain Douglas, merit attention. The section on
 which the habeas corpus was based was analogous to sect. 154,
 sub-s. 4. The justice was directed to imprison if certain proof
 was given which convinced him.

The contrast, however, between the procedure under 5 & 6 Vict.
 c. 12, sect. 22, and sect. 154 of the Army Act is in some respects
 striking. The Court of Summary Jurisdiction is substituted
 for the single justice sitting out of petty sessions. The Court
 must act on confession or evidence; knowledge by the
 justice is excluded as basis of decision. The Court must be
 "satisfied" on the prescribed materials that "the person is a
 deserter"—a more emphatic description of the judicial duty than
 is contained in the word "appear" in sect. 22 of the earlier
 statute. The custody is forthwith to be delivered to the military
 authority direct, and not to a gaoler. Sub-s. 3, referring to
 procedure in indictable cases, has no counterpart in sect. 22. Why
 was it introduced? It does not change the composition or quality
 of the Court; it authorizes indictment procedure when the nature
 of the case would make such procedure advisable, including
 depositions and bail.

The exact relation of sub-s. 3, to sub-s. 4 is not, in the
 present context, clear, and appears to have caused some con-
 fusion. Whether the word "may" in sub-s. 3 gives a discre-
 tion or imposes a duty, was not discussed in argument. The
 Summary Jurisdiction Court, in dealing with the person brought
 before it as if such person was charged with an indictable offence,
 is not to return for trial before a jury; clearly the case must be
 disposed of in the special manner prescribed by the Act. Sub-s. 4

(1) 3 Q. B. 825.

(2) [1894] 2 I. R. 158.

K. B. Dir. directs the Court if satisfied that the man is a deserter forthwith
 1916. to commit him to military custody. The Court has in such case
 REX no liberty of choice. What is to happen if the Court is not so
 v. satisfied? Is that to bar the further progress of the proceedings?
 JONES. Sub-s. 3 would be against that view. If there is a *prima facie*
 Gibson J. case fit to be tried in the prescribed manner, there is nothing to
 show that the case may not go on. Bail could in such state of
 things be allowed. Arrest, or continuance under arrest, or custody
 under sub-s. 4, is not a necessary condition to the maintenance
 of proceedings. In the absence of authority, it would seem to
 me that sub-s. 4 was intended for a clear case when the Court
 was satisfied of guilt. If it was so satisfied, then the man was to
 be delivered over to military custody forthwith, without possibility
 of bail, the order fixing him with the status of a person, for the
 time at least, subject to military law. The decision against
 the accused under sub-s. 4 is final as regards immediate custody,
 and deprives of his liberty forthwith a person who might, in fact,
 not be subject to military law at all.

Sub-s. 3 is for the protection of the arrested person. It
 gives him time if he wants to be defended; depositions in place
 of oral evidence would afford the Court opportunity for deliberate
 consideration; would bring home to it sense of judicial responsi-
 bility, important if it was asked to take the drastic course con-
 templated in sub-s. 4; would assist a Court in future proceedings;
 and might conceivably be utilized, in the event of habeas corpus
 being applied for, to challenge the validity of an order under
 sub-s. 4—if a Superior Court was at liberty to examine evidence,
 as it was held in *Sullivan's Case* (1), and *Heaphy's Case* (2), might be
 done under the Crimes Act, 1887, which required written deposi-
 tions. Parliament might have contemplated such possibility. *Re*
Douglas (3) was decided in the year 1842.

My conclusion on sub-ss. 3 and 4 would be, apart from
 authority, that though a *prima facie* case is sufficient to justify
 the Court in allowing the proceedings to go on under sub-s. 3,
 the proof, before the accused is to be handed over to military
 custody under sub-s. 4, must be much stronger. The Court

(1) 22 L. R. Ir. 98.

(3) 3 Q. B. 825.

(2) 22 L. R. Ir. 500.

must be itself convinced that the person is in fact a deserter subject to military law. Under sub-s. 3 the custody, if the accused was not bailed, would be with the civil gaoler. Sub-s. 4 makes the custody military. An order of this latter type is subject to quite different considerations from the one affecting proceedings under sub-s. 3. It would allow a case stated; might possibly be within the principle of *Rex v. Bolton* (1); and might be exposed to challenge on habeas corpus as in *Re Douglas* (2). Confusion has arisen from not observing the special conditions to which sub-s. 4 was addressed, and from importing into it considerations only germane to the ordinary exercise of jurisdiction under sub-s. 3. Mr. Reardon stated that the only provision enabling a suspected deserter to be delivered to military custody was sub-s. 4. This was not controverted. The detention of Jones is only justified by an order under sub-s. 4. If when the person charged was brought before the Court, the case was treated as an offence case, it might be summarily and finally disposed of, should the military authority elect to proceed before that Court. The dilatory process of a preliminary hearing to ascertain whether there is sufficient evidence, and afterwards final adjudication, is not indispensable. I think sub-s. 3 by the word "may" gives a choice. Where the evidence is complete, and the Court is duly constituted, why should not the case be adjudicated on?

It is only in a case where the facts seem to the Court certain and convincing that an order can be given under sub-s. 4. Had the order before us been made out not under sub-s. 4, but under sub-s. 3 to deliver to gaol, the problem would have been different. Such order, founded on prima facie evidence, would carry the accused person to a suspense account, if the offence charged was not at once disposed of, and bail might be allowed. An order, however, under sub-s. 4 invests the accused there and then with the status of soldier; he cannot be bailed; and a soldier he must remain till the offence is tried in some way, or otherwise dealt with. He receives there and then the brand of being a deserter.

The only other part of the Act of 1881 that requires notice is

(1) 1 Q. B. 66.

(2) 3 Q. B. 825.

K. B. Div. sect. 166 as to summary proceedings for offences. Sub-s. 5
 1916. requires two justices in Ireland, as did the Army Act, 1879, c. 33,
 REX section 159, in England. Our Petty Sessions Act, and the English
 v. Summary Jurisdiction Act, 1879, c. 49, s. 20, make it certain that
 JONES. in offence cases there must be a Court of at least two. Mr. Henry
 Gibson J. admits this, which was decided in *Walder v. Turner* (1).

The Reserve Forces Act, 1882, in sect. 15, deals with the offences therein mentioned in the same way. Section 154 of the Army Act of 1881 is made applicable by sect. 16, which directs how the deserter delivered into military custody is to be tried.

Whether under these statutes, a decision under sub-s. 4, that the man is a deserter, is or is not final as to the status of the person as subject to military law, I leave open. A decision that he was subject to military law might not necessarily involve that he was a deserter; inquiry might show that his absence was excusable: see *Manual of Military Law*, 1914, p. 18, sect. 13.

Under 5 & 6 Geo. 5, c. 104, the point would largely depend on whether an order under sect. 154, sub-s. 4 (if that section is applicable), finding that the prisoner was ordinarily resident in Great Britain, was included in and was part of "the proceedings in respect of an offence," in which case the presence of two justices might be essential. On the other hand, if such order was not part of such proceedings, the order could not prejudice the prisoner's right to have the fact of ordinary residence determined when the offence was made the subject of substantive complaint. I shall say something as to 5 & 6 Geo. 5, c. 104, presently.

Whatever be the effect of an order under sect. 154 as to status in reference to future proceedings, it has for the moment conclusive effect, if within jurisdiction. It delivers forthwith the man charged into military custody, and protects the military authority from any complaint of false arrest. Once in such custody, he is a soldier and no longer a civilian, and his position thenceforward depends on the action the military may see fit to take.

The order of October 31st does not purport to disclose (and, indeed, as Mr. Henry states, was not intended to decide) any conclusion of the Court as to the ordinary residence of Jones—an essential condition to its validity under sub-s. 4. For some time

during the argument of the applicant's counsel I thought the point which would be relied on was that the order, if not on its face sufficient, could be aided by sect. 172, sub-s. 4, of the Army Act, and by the *Athy Case* (1). No such question, however, arises. I express no opinion as to the form in which an order ought to be drawn. According to our settled Irish summary jurisdiction law, due exercise of jurisdiction on legal grounds should be shown in some judicial record. The term "unlawfully" in a charge or order may not be enough. Neither charge nor order avers that Jones was ordinarily resident in Great Britain on August 15th, 1915, the matter in controversy which the Court was to consider. This question of form does not now require decision.

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This would be sufficient to dispose of the case; but the statute 5 & 6 Geo. 5, c. 104, on the application of which the controversy has arisen, requires short consideration. My construction of the enactment helps my conclusion on the effect of the earlier legislation.

It was assumed on both sides that sect. 154, sub-s. 4, of the Act of 1881 was applicable to the new kind of suspected deserter created by 5 & 6 Geo. 5, c. 104; and that two Courts might operate, one for the purpose of committal, the other for the purpose of final decision: such last Court being composed of at least two justices (in country cases) at Petty Sessions. The point is not free from difficulty. If the phrase "proceedings in respect of an offence" includes the step contemplated by sect. 154, sub-s. 4, a civil Court of two justices might be necessary. Might there not be a prosecution for the military offence of desertion without any preliminary arrest—only necessary when the accused might abscond? Is such arrest made a condition to prosecuting before the Court of summary jurisdiction? If, however, the proceeding for committal under sect. 154, sub-s. 4, is not part of "the proceedings in respect of an offence," and the duty of deciding the dispute as to status is left to the ultimate Court which has to try the alleged offence, it is odd that on that view the statute should be silent as to the duty of the first Court in reference to sub-s. 4 and such dispute, though manifestly it must deal with the dispute as to residence before the man arrested can be held to be a deserter

(1) [1912] 2 L. R. 64.

K. B. Div. and delivered unto military custody. The inconvenience of two
 1916. Courts of summary jurisdiction being called on to decide the same
REX question at different stages, the first final as to immediate imprison-
v. ment, the second final as regards conviction or acquittal, with
JONES. different results, possibly on the same evidence, is obvious. Why
 Gibson J. should two proceedings be required when the whole dispute could
 be adjudicated on at once? The controversy ought to be disposed
 of by the civil Court with as little delay as may be. Our whole
 law is opposed to unnecessary detention: *Wright v. Court* (1);
Davis v. Capper (2). In *Blake's Case* (3), the King's Bench went
 so far as to hold that delay might justify habeas corpus. Why
 should not a person whose military status is uncertain be pro-
 ceeded against before a Court whose decision as to status and
 committal would be final? But for the accidental circumstance
 that Mr. St. George sat alone, the present double procedure would
 have been unnecessary. The charge on which Jones was arrested
 could have been decided at once. Can a justice, by sitting alone,
 impose on the accused the necessity of undergoing imprisonment
 and meeting a further trial? The hardship would be the greater
 if the two phases of the proceedings took place in different parts
 of the United Kingdom—one in Ireland, the other in England.
 If two Courts are invited to hear the same dispute, it would place
 the second Court in the invidious position of acting as a kind of
 appeal tribunal; while the man charged, in addition to his deten-
 tion being unnecessarily prolonged, would be handicapped by being
 in military custody adjudged to be legal. Here Mr. St. George
 acted in exactly the same way as if petty sessions law (see sect. 8,
 sub-s. 2, of the Act, 1851) was out of the way, and as if he was
 dealing with an indictable offence such as was considered in the
Belfast Case (4). The case was, however, a summary jurisdiction
 case; and he could only act as a Court of Summary Jurisdiction
 under sub-section 4, not as an ordinary magistrate under his
 commission.

A solution which might get rid of the absurdity, inconvenience,
 and, possibly, mischief of asking two Courts at different stages to
 decide as to ordinary residence, might be to interpret the statute

(1) 4 B. & C. 596.

(2) 10 B. & C. 23.

(3) 2 M. & S. 428

(4) [1913] 2 I. R. 242.

of 1916 as prohibiting the question raised from being adjudicated on at any stage save by a civil Court. An order under sect. 154, sub-s. 4, necessarily decides as to status. It converts the person into a soldier, and puts him into military imprisonment. The detention as military prisoner, long or short, can never be undone. The order adjudicates on and prejudges for the time the question of status and residence. The intention of the Act of 1916 was to preserve civil status intact till the dispute could be decided. Such status is not intact if the accused is put in military custody as a deserter without bail. This view as to sub-s. 4 being incompatible with the statute of 5 & 6 Geo. 5, if the Court is composed of one justice, may be worth consideration; but as it was not argued, I do not discuss it further.

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Had a competent Court sat and decided in appropriate legal form, the order could not have been impeached for want of evidence, as there was sufficient evidence if the question of the sufficiency of evidence could be at all inquired into.

Two decisions of the English King's Bench Division, not yet in the authorized reports, were cited by Mr. Henry. They relate to orders made under sect. 154, sub-s. 4. In *Ferguson's Case* (1), the application for habeas corpus was based on the insufficiency of evidence, and no question was raised as to the actual order or form of the warrant or as to the magistrate not having decided the fact of ordinary residence. In the papers procured for the Court by Mr. Cusack there is a short note of the order in the words "handed over to the military authorities." Whether a formal order was made up, and what was in the warrant mentioned by counsel, does not appear. I do not know the practice in the London Metropolitan Court. It may be quite different from the stringent statutory procedure governing our summary jurisdiction in Ireland. The extract from the London magistrates' book sent over is indorsed "conviction," a curious description. The argument proceeded on the basis of an order or direction and warrant, sufficient in form, and that there was an actual decision on the dispute as to ordinary residence. I would collect from the brief report in the *Times*, November 7th, 1916, if accurate, that two

K. B. Div. points were decided. The first was that *Reg. v. Bolton* (1) applied.
 1916. The second was that habeas corpus was not a competent remedy,
 REX as it would not be available if the function of the metropolitan
 v. magistrate was merely that exercised in returning a case for trial.
 JONES. On the other hand, would *Reg. v. Bolton* (1) apply to such committal
 Gibson J. order with a view to trial? I do not deem it necessary to consider
 and decide the first point, as to which the opinions of Palles C.B.
 and Andrews J., in the case under the Crimes Act, 1887, might
 possibly be relied on to support the opposite conclusion. As to the
 second point, the Court was not referred to the case of *Re Douglas* (2).
 The statute 5 & 6 Vict. c. 12, sect. 22, no doubt contained no
 provision similar to sub-s. 3; but I cannot believe that sub-s. 3
 was intended intrinsically to alter the nature of the jurisdiction
 and responsibility of the Court under sub-s. 4, or to reduce or
 destroy the obligation and condition imposed by sub-s. 4. How
 can sub-s. 3 be construed as depriving the subject of the habeas
 corpus remedy allowed in 3. Q. B. 825? My view of sub-s. 3
 (as already explained) is that, far from restricting or diminishing
 protection, its object was to enlarge for the accused such
 protection.

The judgment of the Court was no doubt influenced by the
 previous decision in *Walder v. Turner* (3), which I now proceed
 to consider.

It was decided on case stated, a form of appeal not competent
 against a justice in performance of the duty of returning a case
 for trial. The Court held that one justice could adjudicate,
 mainly on the effect they gave to sub-s. 3. It is not necessary to
 decide this point now if the order of October 31st was bad. I
 leave it for a future case. The judgment was relied on by
 Mr. Henry chiefly for the reason of the decision, namely, that the
 Court might deal with the matter just as if the charge was one of
 an indictable offence, where the accused would be committed for
 trial if a *prima facie* case was proved against him. Mr. Henry
 contended that this meant that a magistrate under sect. 154,
 sub-s. 4, was not required to form any conclusion of his own as to
 the status of the accused, but was only called on to decide as to

(1) 1 Q. B. 66.

(2) 3 Q. B. 825.

(3) 33 T. L. R. 1.

the existence of a *prima facie* case. I do not adopt this construction of the language. In a passage just before, the judgment refers to the words "if satisfied." The applicability of the remedy of case stated, and the view that *Reg. v. Bolton* (1) extended to the adjudication, would seem inconsistent with Mr. Henry's interpretation. I think that the language really means that though the magistrate must decide and be satisfied in his own mind that the man is liable on the evidence before him, his conclusion leaves the ultimate question of the offence open for future and final adjudication. For reasons already stated, I think that sub-s. 3 and sub-s. 4 are addressed to different conditions; the former refers to proceedings up to and at trial; the latter deals with the accused being at once, in a clear case, handed into military custody—a custody justified under sub-s. 4, and apparently under that provision only.

Even this restricted construction of the language attributed to Mr. Justice Avory is subjected to the difficulties to which I have already adverted. As the order of 31st October does not purport in form to decide, and was not indeed intended (as is expressly admitted) to decide, that Jones was ordinarily resident in Great Britain at the critical date, but only decided that, there being *prima facie* evidence, the magistrate was bound to deliver him over with a view to future proceedings, Mr. Henry was compelled to contend for the wider interpretation of the judgment. The logical consequence would be that if the order expressly stated that the magistrate had not felt bound to form any conclusion of his own, or to find that Jones was ordinarily resident in fact, but that he held that there was *prima facie* evidence, and therefore caused Jones to be delivered over, such order would be sufficient. I think such order would be absolutely contrary to sect. 154, sub-s. 4. Justices often return for trial, and Grand Juries find bills, though, on the evidence, if the decision rested with them, they would acquit. In *Walder v. Turner* (2) the Court does not seem to have been referred to the historical context and sequence of the legislation, illustrated by 5 & 6 Vict. c. 12, sect. 22, and *Re Douglas* (3). If my reasoning may seem to be in conflict in some

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(1) 1 Q. B. 66.

(2) 33 T. L. R. 1.

(3) 3 Q. B. 853.

K. B. Div. respects with that of eminent judges, I regret it; if it is erroneous,
 1916. I can only say that my error is not the result of want of care in
 REX disposing of a case to which I have given anxious consideration,
 v. and some research. In applying this remedy of habeas corpus,
 JONES. the Court, as is established by a long course of judicial precedent,
 Gibson J. is bound to act on its own view of the rights of the person asking
 to be discharged.

Neither of the two English cases, however, is opposed to my conclusion as to the order or direction of October 31st. Each, as I read it, proceeded on the unquestioned footing, that the magistrate had discharged his judicial duty under sect. 154, sub-s. 4, and satisfied himself that the condition was fulfilled. They do not decide, in my view, that on a *prima facie* case, without being himself satisfied, the magistrate could, or rather must, hand over the person charged to military custody.

Mr. Henry appeared at one time to suggest that a mere direction, without any proper order being recorded in the petty sessions book, such as our Act contemplates, might be sufficient. If that were so, what the magistrates orally decided might be the subject of parol evidence and controversy—a most inconvenient result. There ought to be some kind of record excluding doubt or dispute. I say nothing as to how, or in what form, the Court action under sect. 154, sub-s. 4, should be authenticated. Action under sub-s. 4 is quite unlike the step taken under sub-s. 3. Sub-s. 4 is drastic, and, as regards custody, final. It has all the features of a summary jurisdiction order.

In *Ferguson's Case* (1) there seems to have been a warrant which may have shown the adjudication. There was apparently no warrant here. It seems to me impossible that the accused could be detained by the military officer without some kind of valid written authority. If habeas corpus lies, and the proceedings went on as in *Re Douglas* (2), must not the return show a legal determination as to status? There was a warrant in that case. Sect. 154, sub-s. 4, is silent as to any warrant; it would suggest that the custody was to be given by the order adjudicating as to status, from which custody necessarily is to follow.

(1) Unreported.

(2) 3 Q. B. 825.

For the above reasons I hold that the record of what the magistrate did in delivering Jones to military custody did not decide, and does not purport to decide, the status of John Jones in fact, and proceeded only on the view that there was a *prima facie* case; it was, therefore, manifestly invalid. Jones is entitled to be discharged from military custody attributable to that order, even if all the other topics advanced on his behalf were ruled against him.

I have throughout this judgment referred to the Army Act as printed in the Manual of Military Law, 1914, in accordance with the curious provision of the Army Act, 1884, c. 8, sec. 8: see p. 378 of the Manual.

My Brother DODD, who is unable to be here to-day, concurs generally in the result that Jones should be discharged.

Solicitors for the prosecutor: *John J. Power*.

Solicitors for the respondents: *Arthur Wynne* (*Chief Crown Solicitor*).

C. N. K.

[See as to habeas corpus *R. v. Mountmorris*, Ir. T. R. 460 (1795), decided on 34 Geo. III, c. 19 (Irish), and Bacon's Abridgment Habeas Corpus B, 9, 10. The form in sect. 154 first occurs in the Army Discipline Act, 1879: compare the Mutiny Acts, 1875, 1876, and 1878, introducing 11 & 12 Vict. c. 42, sect. 21. See on the effect of the legislation, *Wolton v. Gavin*, 16 Q. B. 48, the judgment of Erle J. and Lord Campbell C. J. at p. 80—J.G.G.]

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H. L. HOLLINSHEAD AND ANOTHER, APPELLANTS; M'LOUGHLIN
1916. AND ANOTHER, RESPONDENTS (1).

Nov. 20.

Bankruptcy — Examination of Witnesses — Unsatisfactory Answering — Committal—Irish Bankrupt and Insolvent Act, 1857 (20 & 21 Vict. c. 60), s. 385—Appeal to House of Lords from Order reversing Committal Order—Competency of Appeal.

Upon appeal to the House of Lords from the decision of the Court of Appeal, [1916] 2 Ir. R. 583, *sub nom. In re M'Loughlin* :

Held (agreeing with the judgment of Ronan L.J.), that the order of Boyd J. having been made on the grounds that the evidence of both the bankrupt and his wife as a whole was characterized by fencing and shuffling and a desire to avoid giving any definite answers if possible, and that it was plainly not candid, that the judge was entitled to form the opinion that it was false and unsatisfactory and justified in coming to the conclusion that a committal might induce the witnesses to make a full, true, and candid statement.

Held, that an appeal lay from the order of the Court of Appeal reversing the committal order made by Mr. Justice Boyd.

And *held*, that the order of the Court of Appeal should be reversed and that of Boyd J. should be restored.

APPEAL by Alfred Hollinshead and James A. Kiernan, assignees of Patrick M'Loughlin, a bankrupt, from an order of the Court of Appeal (2), reversing the order of Boyd J. committing to prison the bankrupt, Patrick M'Loughlin, and his wife, Ellen M'Loughlin, for unsatisfactory answering.

Healy K.C., Wyllie K.C., and E. S. Murphy, for the appellants.

Serjeant Sullivan K.C. and Martin Maguire, for the respondents.

VISCOUNT HALDANE (3):—

My Lords, this is an appeal from the Court of Appeal in Ireland, which raises a question of practice of considerable importance, because, if the reasons for the judgments of the

(1) Before LORDS HALDANE, ATKINSON, and SHAW OF DUNFERMLINE.

(2) Reported [1916], 2 Ir. R. 583.

(3) The report of the judgments in the House of Lords has been printed from the shorthand notes of Messrs. W. B. Gurney & Son.

majority stand as they do at present, a considerable restriction will be placed upon a certain procedure under the Irish Bankruptcy and Insolvency Act of 1857, which hitherto has been regarded in a somewhat different light from that in which the Court of Appeal, by a majority, have regarded it.

My Lords, in the present case two people called M'Loughlin, a man and his wife, had a house, and apparently when the house was bought, and when the property was developed by further building being put upon it, the wife had made considerable advances. A time came when the husband was minded to sell the property, and he entered into a contract to do so, but it turned out that he had made what appeared on the face of it to be an absolute assignment to his wife, which appeared in the abstract of title, and the purchaser took objection, and an endeavour was made to cure the objection by an affidavit, in which it was stated that there was a verbal agreement between the husband and wife that the property assigned should stand only as security to the wife for the amounts she had advanced, and that for the rest it belonged absolutely to the husband. But it was held by Mr. Justice Barton, and, I think, affirmed by the Court of Appeal, that a vendor who contracts to make a title cannot make out his title by showing that there is a title vested in somebody else, who, there being nothing to that effect in the contract, volunteers, but is not bound, to come in and convey; and, further, that the statements in the affidavit of the verbal agreement were not of such a kind as satisfactorily cured the difficulty, and that the vendor had not shown an absolute title in himself.

My Lords, these proceedings having failed, the husband then brings an action for negligence against the solicitor who had advised him in this matter, an action in which he did not succeed. It was tried, but he failed, and he was ordered to pay the costs of the solicitor. In that action, which was brought by the husband, he alleged in his statement of claim that he was the absolute owner, subject only to the advances made by his wife, which amounted, as it is put there, to £150.

My Lords, it is said now that that was merely a pleading statement, that it does not represent the mind of Mr. M'Loughlin at that time. But it is very difficult to imagine that the solicitors

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who had taken up his case, and brought the action for him against the original solicitor, would or could instruct counsel, without endeavouring to ascertain the facts; and certainly the allegation in that statement of claim affords, to my mind, a very strong presumption that Mr. M'Loughlin throughout took the view that he was the absolute owner, subject only to a mortgage to his wife, in whom the legal estate was vested.

Then, my Lords, came the proceedings out of which the present question arises. M'Loughlin is adjudicated a bankrupt at the instance of the solicitor, whose costs in the action for negligence he has been ordered to pay; and then the assignee endeavours to get in M'Loughlin's assets, and one of the assets he wants to get in is this house. But M'Loughlin says the house is his wife's. Then, under sect. 385 of the Bankruptcy and Insolvency (Ireland) Act, 1857, M'Loughlin and his wife are examined. Now, the statute says, by sect. 385, that if anybody does not fully answer any question to the satisfaction of the Court, put to him in an examination under that and other sections, that person is to be liable to be committed to prison. Well, first of all, M'Loughlin appears, and is examined by Mr. Justice Boyd, a judge of great experience. Then Mrs. M'Loughlin appears, and is examined. The judge is very much dissatisfied with what they state; and, disbelieving them, commits them to prison on the ground that they have not answered fully or satisfactorily. They apply to him for an opportunity of appearing again, which is given to them, and again the learned judge thinks that they have not answered fully or satisfactorily, and that it is right that he should exercise his power within the meaning of the section by sending them back to prison. Well, that was the opinion of the learned judge after seeing both the husband and the wife, and putting to them a number of questions.

I have read carefully through the affidavits. I am not going to read them again. They have been read several times in the course of these proceedings; but I cannot accept the view which was argued before us with great earnestness by Sergeant Sullivan, that the real point of the judge was that he had made up his mind that the old statement that the property was the husband's,

subject to the wife's mortgage, was the true one—that is the statement made in the affidavit at the time of the vendor and purchaser litigation—and that the subsequent statement was untrue, and that his purpose was to use the powers of the section punitively, so as to compel M'Loughlin and his wife to accept the version which they had given originally, and so to pave the way for the assignee getting the property.

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My Lords, as I say, I cannot accept that representation of the effect of what Mr. Justice Boyd did. I think what Mr. Justice Boyd did was to hear the evidence, to look at the documents and the circumstances, and, judging by the demeanour of the witnesses, to come to the conclusion that they were not candid with him, and that the real truth was in the account which they had given of the matter when the affidavit was originally made on the previous occasion, and that consequently they must be taken to be fencing and endeavouring to withhold the truth from the Court.

Now, my Lords, that being Mr. Justice Boyd's decision, there was an appeal to the Court of Appeal, and I want to point out that, although it is not the case that it is not open to the Court of Appeal to differ from the learned judge who has seen the witnesses, still a Court of Appeal ought to be careful about differing, remembering, particularly in a case of this kind, the immense disadvantage that the Court of Appeal is in which has not seen a witness, and has only the written record of what the witness has said in answer to the questions put. Of course, if there has been any departure from principle on the part of the learned judge who estimates the evidence, and comes to a conclusion upon it, that is quite a different matter; but in the absence of any such departure from principle, the Court of Appeal ought to regard the conclusion come to by the judge who has seen the witness with much respect, and not to differ from it lightly.

Now, the Court of Appeal was divided. The Lord Chancellor of Ireland and Lord Justice Molony took one view, and Lord Justice Ronan took another view. I think the effect of the Lord Chancellor's judgment is to show that two considerations were in his mind, and I am not sure that the one did not somewhat influence him in arriving at the other. The Lord Chancellor

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desired to put a more restricted construction upon section 385 than was put on it by Mr. Justice Boyd. He desired to draw a distinction between examination, however searching, and cross-examination. My Lords, I agree with the learned Lord Chancellor in thinking that the section is not enacted for the purpose of giving a merely punitive jurisdiction to the learned judge who exercises it; it is given for the purpose of enabling him to compel an answer which is candid, and, therefore, when you come to ask what is the difference between searching examination and cross-examination in this connexion, I think the difference is an illusory one. The judge ought not to exercise his powers oppressively, but he ought to exercise them so thoroughly that he feels that he has exhausted all the means of getting at the truth; and, indeed, the statute shows in a subsequent section that in the case of a witness at a distance, he may allow counsel for parties interested to do what he himself would do, and apparently a practice has grown up of allowing counsel to be employed to assist in the examination.

Now, my Lords, it is quite true that neither M'Loughlin nor his wife had the assistance of counsel on their behalf at the examination, but I cannot see that there was anything in which counsel could have helped them, or that the learned judge's conclusion was likely to have been affected thereby, and I am unable to take the view which the majority of the Court of Appeal took, that the manner in which Mr. Justice Boyd conducted the process of examination was one which took the case over the line. I think he kept himself within the line, and followed a principle which is open to the bankruptcy judge in exercising his jurisdiction.

Lord Justice Ronan seems to me to put the point accurately in the concluding paragraph of his judgment. He says that if he had taken the view of the Lord Chancellor that the motive of the learned judge was to get out something satisfactory to the assignees, that he had fixed his mind *a priori*, and apart from the evidence based upon a conviction that the property ought to pass to the assignees, then he would have agreed with the Lord Chancellor. But in his opinion, he says, "the order was made on the grounds that the evidence of both witnesses as a whole was characterized by fencing and shuffling, and a desire to avoid

giving any definite answers if possible; that it was plainly not candid; that the judge was entitled to form the opinion that it was false, and justified in coming to the conclusion that a committal might induce the witnesses to make a full, true, and candid statement." My Lords, that passage in Lord Justice Ronan's judgment entirely expresses the view which I myself have formed after a somewhat close consideration of these depositions, and to my mind it is one which is preferable to the view expressed by the Lord Chancellor of Ireland and Lord Justice Molony.

My Lords, there was one other point taken in the case which I ought to mention. A preliminary objection was made to the hearing of this appeal, on the ground that this was really a proceeding in the nature of habeas corpus, where once the freedom of a subject having been ordered, then upon principle, and in accordance with the decision of your Lordships' House in the case of *Cox v. Hakes* (1), it was impossible for the Court of Appeal to review a judgment for liberation from prison. The decision in *Cox v. Hakes* (1) was based upon the principle of the common law, and upon the terms of the statute of Charles II, which governs habeas corpus proceedings.

My Lords, no doubt that is quite true in a case which is really in the nature of habeas corpus proceedings; but here, although the method of habeas corpus appears to be open under the Act of 1857, and to have remained open, at any rate till the jurisdiction of the then bankruptcy commissioners was transferred to the High Court, there has throughout and from the beginning been another and alternative method, and that is to appeal, and the right of appeal is expressly given from any order made. I am of opinion that, in the present case, all that we have before us is an appeal from an order which has been made by the bankruptcy judge, and nothing else, and consequently that the considerations to which I have alluded do not apply. There was an appeal from that judge to the Court of Appeal, who directed liberation, and now there is an appeal to your Lordships' House, which obviously can be entertained, unless there is some statutory reason to the contrary.

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(1) 15 A. C., p. 506.

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My Lords, for these reasons I move your Lordships that the judgment of the Court below be reversed, and that the appeal be allowed with costs.

LORD ATKINSON:—

My Lords, I concur.

As to the preliminary point, I think, for the reasons given by my noble and learned friend on the Woolsack, it is unsustainable. I concur in the judgment given by Lord Justice Ronan. I agree with him in thinking that this statute was passed for the sole purpose of enabling a thorough and searching examination to be conducted to ascertain the truth as to the property of the bankrupt. If it is used for any other purpose, then it is abused; and an order made to effect that indirect purpose could not be allowed to stand. But it is not alleged in this case that Mr. Justice Boyd put these powers in force for any other purpose than to ascertain the truth—What was the property to which the bankrupt was entitled?

Now, Lord Justice Ronan most properly called attention to the statement of Baron Anderson in the case of *Ex parte Lord* (1), where that very distinguished and learned judge said: "Is not the criterion whether a reasonable man would believe the story told?" That is the criterion. Can it possibly be said that in this case a reasonable man might not believe that this man and woman were shuffling, that they were uncandid, that they avoided telling the truth? It seems to me quite impossible to believe that these people were making a candid disclosure of what they knew touching the bankrupt's affairs. The object in putting the question to them must not at all be confounded with the result of their answers. It may be that the answer they gave, if it was a truthful answer, would vest the title in the assignees, or it may be that it would defeat the title of the assignees; but because a truthful answer would vest the title in the assignees, there is no reason or no justification whatever for asserting that the question was put in order to benefit the assignees, or in order to vest the title in them. The question is put to elicit the truth, and the consequence of success in that may be to show that the trustees are entitled.

I also concur with Lord Justice Ronan in what he suggests in his judgment on page 40 (1), that of course the demeanour of the witnesses should be taken into consideration by any judge who has to form an opinion upon their truthfulness. It has again and again been laid down in this House in questions of a new trial that, while on other points the opinion of the trial judge is not to prevail, yet on the question of the veracity of a witness it is all-important; and no man who has ever had any experience of dealing with witnesses and dealing with *viva voce* evidence would not be well convinced that sometimes a witness may say "No" in such a way, and after such hesitation, that he may perfectly convince one that "Yes" is the truth. Therefore I submit that it would be quite a mistake for the judge to neglect to take into account the demeanour of the witnesses who were before him to give this evidence.

I concur with my noble friend on the Woolsack in thinking that Lord Justice Ronan has succinctly, clearly, and accurately put the law in the last paragraph of his judgment, when he says that "the evidence of both witnesses as a whole was characterized by fencing and shuffling, and a desire to avoid giving any definite answers if possible; that it was plainly not candid; that the judge was entitled to form the opinion that it was false, and justified in coming to the conclusion that a committal might induce the witnesses to make a full, true, and candid statement." I think, therefore, that the order appealed from was wrong, and should be reversed; that the order of Mr. Justice Boyd was right and should be affirmed, and this appeal should be allowed with costs.

LORD SHAW OF DUNFERMLINE.

My Lords, I concur.

There is one sentence in the judgment of the Lord Chancellor of Ireland to which I call attention. He says—"that while the examination of the bankrupt should be as searching as possible, it should be conducted in a fair, calm, and impartial manner." My Lords, I am of opinion, having read the whole of the examination of the bankrupt and his wife in this case, that these canons were

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(1) See [1916] 2 I. R., p. 607.

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complied with, and that Mr. Wylie so acted in this case as to enable him to do what it was his duty and no less than his duty to do, namely, to confront the bankrupt and his wife with sworn affidavits emitted by them, and also to confront the bankrupt in the second place with a written statement made on his behalf in a suit in one of the Courts of Justice in Ireland.

My Lords, with regard to the action of Mr. Justice Boyd, I so far agree with the astute argument delivered by Serjeant Sullivan, that taken by themselves certain isolated passages would appear to point in the direction of the conclusion that the learned judge was demanding answers in a particular sense. My Lords, I do not think that that was meant by the learned judge, or so understood by the witness, and upon this topic I entirely agree with the view of the actings of Mr. Justice Boyd taken by Lord Justice Ronan in his judgment.

I desire, however, to part from this topic with this observation, that examination of the bankrupt ought to be conducted in such a way as to avoid any kind of concussion upon the bankrupt to make him give evidence in one direction rather than another. A bankruptcy examination ought not to be converted into a torture chamber. The sanctions of the law behind the evasions or concealments or untruths of bankrupts are strong enough without concussions in the course of the examination being practised. I am glad to think, my Lords, that in the present case there is no trace of any such concussion.

The duty of the bankrupt, my Lords, is in the course of his examination to assist the Court in the distribution of his estate for the benefit of his creditors, by furnishing all the information available and known to him. As I say, he dare not practise evasion, he dare not practise concealment, he dare not practise untruth; and, if he does not avoid all these things, he is then confronted with the power of commitment granted under the statute to the examining magistrate or judge. The language of the statute is to the following effect. Under sect. 385 power is given to the judge to commit the bankrupt or any other person who gives evidence in such proceedings "if such person shall refuse to answer any lawful questions put by the Court, or"—and that is the present case—"shall not fully answer any such question to the satisfac-

tion of the Court." It appears to me that bankruptcy judges are, as they certainly should be, somewhat slow to put this grave power—the power of commitment—into exercise, and it is not trifling variations from the truth which would induce judges of experience to give this extreme sanction to their views.

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But, my Lords, there are two views of what may occur; and on either view it would appear to me that it was within the discretion of the judge to pronounce this order in the present case. In the first place, I agree with Mr. Healy in the view that he presented, that a reasonable judge is not bound to be satisfied with what he believes to be a lie; that would not answer the condition of the statute which prescribes that the person giving evidence shall "fully answer the question to the satisfaction of the Court." No Court is bound to be fully satisfied with a lie. But there is also a second case which I will now venture to state. When a witness in a bankruptcy examination is in possession of knowledge on a material and crucial topic with regard to the distribution of the estate, and when that witness gives no help in getting at the truth, but, on the contrary, leaves two sworn contradictory versions in the possession of the Court, without explanation as to where the real truth lies, then no judge appears to me to stand bound to accept that as satisfactory to his mind. That being so, then in the present case, either on the view of absolute untruth, or on the view of leaving the case unsatisfactory as to where the truth lay, it appears to me that it was within the discretion of Mr. Justice Boyd to act as he did.

My Lords, I do not part with the case without expressing, as I think I ought to do frankly to your Lordships, that if I had been only in possession of the evidence in the black type in this case, I myself should not have exercised the discretion with regard to imprisonment in the case of the wife. But, my Lords, I am not entitled, sitting here in London, to make that criticism against the action of the learned judge, Mr. Justice Boyd, a judge of great experience, who was entitled to view in the light of that experience the demeanour of the witness, the tone of her evidence, the hesitation or otherwise with which she expressed it. All these things may have had a speaking power upon that judge's mind; and while I should myself have been satisfied had he taken

H. L. the other view, and committed to prison the bankrupt, and not
 1916. done so in the case of the wife, I do not see my way to hold that
 HOLLIN- the decision come to in the exercise of his discretion by the learned
 SHEAD judge was in any respect unsound.
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QUESTIONS PUT.

That the judgment of the Court below be reversed.

The Contents have it.

*That the order of the King's Bench Division in bankruptcy of the
 High Court of Justice of Ireland be restored.*

The Contents have it.

*That the respondents do pay to the appellants their costs in this
 House and in the Court of Appeal.*

The Contents have it.

Solicitors for the appellants: *Speechly, Mumford, & Craig* for
Bennett Thompson & M'Neill.

Solicitors for the respondents: *Herbert Z. Deane*, for *Patrick
 Campbell.*

BRIDGETOWN CO-OPERATIVE SOCIETY
v. WHELAN (1).

C.B. Appeal.
1916.
Nov. 8.

Civil Bill Appeal—Contract—Application for Shares in Co-operative Society before Registration—Continuing Offer—Acceptance by Society after Registration—Industrial and Provident Societies Act, 1893 (56 & 57 Vict. c. 39).

An application for shares made to the promoters of an unregistered co-operative society is a continuing offer, which may, if not revoked, be accepted by the society when registered under the Industrial and Provident Societies Act, 1893 (56 & 57 Vict. c. 39); and the promoters are the agents of the applicant to communicate the offer to the society when so registered.

APPEAL from Clare County Court.

On January 28th, 1913, the defendant applied to certain persons who were promoting a co-operative society for six shares, subject to the rules of the society when formed. One of the rules was to the effect that five shillings per share would become payable on application. On February 24th, 1913, the society was registered under the Industrial and Provident Societies Act, 1893, as the Bridgetown Co-operative Society. On August 21st, 1913, the plaintiffs allotted six shares to the defendant, and gave her notice of allotment, demanding payment of thirty shillings before December 31st, 1913; but she refused to pay.

The plaintiffs accordingly issued a civil bill, claiming £1 10s. for money payable by the defendant to the plaintiffs on foot of six shares in the plaintiff society, applied for by the defendant on January 28th, 1913, and allotted to defendant on August 21st, 1913, on which said shares five shillings per share became payable on or before December 31st, 1913.

The county court judge dismissed the civil bill, and the plaintiffs appealed to the judge of assize. The appeal came on for hearing at the summer assizes, 1916, at Ennis before Ross J., and was adjourned to Dublin for argument.

(1) Before Ross J.

C.B. Appeal. *Phelps*, for the plaintiffs :—

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There was no complete contract till the society was registered. The application was a continuing offer, which could be revoked any time before allotment (*Palmer's Company Law*, 6th ed., p. 105; *Downes v. Ship* (1); *Lawrence's Case* (2)). In these cases, application was made before incorporation and allotment after. The applicants sought to have their names removed from the register, and the cases were argued on the basis of existing contracts. If an applicant could not be bound by an offer to an unregistered company, subsequently ratified, there would have been no need for these cases at all.

[Ross J.:—You say that an offer to take shares made before incorporation and registration is turned into a binding contract by allotment; but that, if there is a variance between the prospectus and the memorandum of association, a shareholder who acts promptly can have his name removed from the register?]

Yes. The distinction between the present case and *North Sydney Investment and Tramway Co. v. Higgins* (3), and *Natal Land and Colonization Co. v. Pauline Colliery and Development Syndicate* (4), is that here we have no contract made prior to incorporation, but merely an offer.

P. D. Fleming K.C. (with him, *Corbett*), for the defendant :—

Up to February 24th, 1913, the promoters could not have been agents, for there were no principals. To make the defendant liable there must have been a new contract entered into after registration. In rule 16 of the rules of the plaintiff society it is laid down that "five shillings per share shall be paid upon application," &c. To make the defendant liable there must have been two contracting parties in existence on or after February 24th, 1913. What went on between the defendant and her neighbours on January 28th could not constitute an offer to the society. The sending of money on application is a condition precedent to allotment: I contend there was no allotment here at all in point of law. Section 85 of the Companies (Consolidation) Act, 1908, sets forth what are the conditions precedent to a valid

(1) L. R. 3 H. L. 343.

(2) 2 Ch. Ap. 412.

(3) [1899] A. C. 263.

(4) [1904] A. C. 120.

allotment. Under that Act, an application for shares in a limited Company without a payment of money is a nullity. If this case came within the scope of company law, it would be at an end: *C.B. Appeal.*
Mears v. Western Canada Pulp and Paper Co. (1). This society, however, comes within the provisions of the Industrial and Provident Societies Act, 1893, sect. 10 of which provides for the making of rules in relation to certain matters, including terms of admission (schedule II., 2, to the Act). A rule (No. 16) has in fact been made, providing (*inter alia*) that "five shillings per share shall be paid on application." 1916.
 BRIDGETOWN
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Phelps, in reply :—

I admit that plaintiffs must fail if the Companies Act applies, but it does not. The Companies Act is disciplinary, whereas the policy of the Industrial and Provident Societies Act (56 & 57 Vict. c. 39) is to foster small societies. Sects. 54 and 55 of the latter Act, which contain provisions for converting a society into a company and a company into a society, show conclusively that a company and a society are two widely different things. I admit that sect. 10 of the Act of 1893 provides for the making of rules; but there is nothing to say that an applicant for shares, who agrees to abide by the rules, can break those rules and then walk out free.

Ross J. :—

By the amended civil bill the society claims to recover £1 10s., 5s. per share on six shares, which sum is payable before or on allotment.

A number of persons interested in the establishment of the society induced the defendant to sign an application for six shares.

At first sight it would appear that the contract entered into before incorporation and registration could not be adopted by the society when it became subsequently incorporated: see *Natal Land and Colonization Company v. Pauline Colliery and Development Syndicate* (2); *North Sydney Investment and Tramway Company v. Higgins* (3); *Kelner v. Baxter* (4). The true view of the effect of

(1) [1905] 2 Ch. 353.

(2) [1904] A. C. 120.

(3) [1899] A. C. 263.

(4) L. R. 2 C. P. 174.

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the document is, I think, to give authority to the promoters to apply for the shares on behalf of the subscribers. It was a continuing offer, which continued in force till the allotment. The shares were allotted, and notice was duly given to the defendant, who did not repudiate the contract before these proceedings were taken.

It is now contended that the society is a company, and that under sect. 85 of the Companies Act of 1908 cash payment must be made before allotment. The argument would be fatal if the plaintiff company was incorporated under that Act: *Mears v. Western Canada Pulp and Paper Company, Ltd.* (1).

This society is, however, incorporated under the Industrial and Provident Societies Act of 1893. It is plain from sect. 54 of the latter Act that the two entities are quite distinct. A society can be turned into a company or *vice versa*. Sect. 10 of the Act of 1893 directs that rules are to be made dealing with (*inter alia*) "terms of admission of members." That section has been complied with. Rules have been made. Whether compliance with these rules is a condition precedent to being registered as a shareholder is quite a different matter. There is no provision to the effect that no one can become a shareholder unless he first complies with the society's rules. That disposes of the argument which is based on analogy with the Companies Act. The 5s. per share is a debt which the society can now recover. I, therefore, reverse the dismiss, and give a decree for £1 10s., with costs.

T. C. T.

Solicitor for plaintiffs: *J. J. Daly.*

Solicitor for defendant: *F. F. Cullinan.*

(1) [1905] 2 Ch. 353.

PROVINCIAL BANK OF IRELAND, LTD. v. THOMAS
O'DONNELL (1).

K. B. Div.
1916.

Dec. 1.

Practice—Courts (Emergency Powers) Act, 1914 (4 & 5 Geo. 5, c. 78)—

Liberty to execute Judgment—Action on foot of a Renewal Promissory Note made after 4th August, 1914, for a Debt incurred prior to that Date—Leave unnecessary.

When the plaintiff obtains judgment in an action taken on foot of the dishonour of a Promissory Note after the 4th August, 1914, he is entitled to execute the judgment, without application for liberty to do so under s. 1 (1a) of the Courts (Emergency Powers) Act, 1914, 4 & 5 Geo. 5, c. 78, notwithstanding that the note sued upon is a renewal note given in respect of a debt incurred prior to the 4th of August, 1914.

SUMMONS, under sect. 1, sub-s. 1 (a), of the Courts (Emergency Powers) Act, 1914 (4 & 5 Geo. 5, c. 5), by the plaintiffs for liberty to execute judgment obtained by them in an action against the defendant as maker of two promissory notes to the plaintiffs which had been dishonoured. The notes sued upon were both renewals of earlier notes made by the defendant, and were made in respect of a debt incurred by the defendant to the plaintiffs prior to the 4th August, 1914. Sect. 1, sub-s. 1 (a), of the Courts (Emergency Powers) Act, 1914 (4 & 5 Geo. 5, c. 5), provides:—
“From and after the passing of this Act no person shall proceed to execution on or otherwise to the enforcement of any judgment or order of any Court (whether entered or made before or after the passing of this Act) for the payment or recovery of a sum of money to which this sub-section applies, except after such application to such Court and such notice as may be provided for by rules or directions under the Act. . . . This sub-section shall not apply to any sum of money . . . due and payable in pursuance of a contract made after the beginning of the 4th day of August, 1914.”

The plaintiffs' application was made under the Rules under the above Act made on 17th September, 1914.

(1) Before GIBSON J.

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1916.

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Phelps, for the plaintiffs:—

It is the general opinion of the profession that liberty to execute the judgment in an action of this kind is not necessary, but there has been no judicial decision.

Ronayne, for the defendant.

GIBSON J.:—

In my opinion the cause of action here does not come within the provisions of the Courts (Emergency Powers) Act, 1914, and this summons must be struck out.

The material portion of the order made was as follows:—It appearing to the Judge that the plaintiffs' cause of action is not within the provisions of the Courts (Emergency Powers) Act, 1914, it is ordered that the plaintiffs' summons be struck out; no costs to either side.

Solicitor for plaintiffs: *John Tweedy*.

Solicitor for defendant: *Mackenzie & Skehan*.

C. N. K.

REX (HIGGINS) v. JUSTICES OF DUBLIN
METROPOLIS (1).

K. B. Div.
1916.
Oct. 27.

Mandamus—Conviction—Detention in Reformatory School—Appeal—Dublin Police Act, 1837 (7 Wm. 4, and 1 Vict. c. 25), sect. 27—Summary Jurisdiction (Ireland) Act, 1851 (14 & 15 Vict. c. 92), sect. 23—Malicious Damage Act, 1861 (24 & 25 Vict. c. 97), sect. 76—Children Act, 1908 (8 Edw. 7, c. 67), sect. 57—Criminal Justice Administration Act, 1914 (4 & 5 Geo. 5, c. 58), sect. 43 (11).

The right of Appeal given by sect. 43, sub-s. 11, of the Criminal Justice Administration Act, 1914 (4 & 5 Geo. 5, c. 58), is not limited to cases where a fine or imprisonment is imposed.

An Appeal lies to Quarter Sessions from a conviction and sentence by a Dublin Police Magistrate imposing detention in a Reformatory under the provisions of the Children Act, 1908 (8 Edw. 7, c. 67), sect. 57.

Semble sect. 43, sub-s. 11, of the Criminal Justice Administration Act, gives the same right of Appeal in Ireland as in England in all cases of summary jurisdiction.

MANDAMUS.

Motion for a mandamus, directed to the justices to accept the recognizances of the defendant with a view to his prosecuting an appeal to quarter sessions. On 1st July, 1916, the prosecutor, Edward Higgins, a boy aged twelve years and ten months, was charged at the Police Courts before Mr. Swift K.C., with acts of malicious damage on various dates.

Having heard the evidence, the magistrate dealt with the prosecutor upon one of the charges in reference to damage to a plate-glass window, deposed to having been to the amount of £4 16s. 4d., and, treating it as within his summary jurisdiction, convicted him, and sentenced him to detention in a reformatory for five years.

On the same day, the solicitor for the prisoner served notice

(1) Before CHERRY L.C.J., and MADDEN and DODD JJ.

K. B. Div. of appeal to quarter sessions before the Right Hon. the Recorder
1916. of Dublin.

On 3rd July, 1916, the prosecutor's solicitor appeared before Mr. Swift K.C., and tendered two sureties—as to the solvency of whom the police were satisfied—to enter into the necessary recognizance for the prosecution of the appeal; but Mr. Swift declined to accept the recognizance upon the ground that, in his opinion, the prosecutor had no right of appeal.

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The prosecutor was confined in Glencree reformatory in pursuance of the sentence.

W. J. Gleeson, for the prosecutor:—

The offence alleged in respect of which the magistrate convicted was under the Malicious Damage Act, 1861 (24 & 25 Vict. c. 97), sect. 52. In imposing the sentence of detention in a reformatory, the magistrate acted under the provisions of the Children Act, 1908 (8 Edw. 7, c. 67), sect. 57.

The right of appeal in the Dublin metropolitan police district may be traced from 7 Wm. 4 and 1 Vict. c. 25, sect. 27, which gives a right of appeal in all cases where the penalty exceeds £5 or one month's imprisonment.

The Summary Jurisdiction (Ireland) Act, 1851 (14 & 15 Vict. c. 92, sect. 23), permits appeal only in cases where the penalty exceeds £1 or imprisonment exceeds one month, the appeal being taken in accordance with the provisions of the Petty Sessions (Ireland) Act, 1851, sect. 24.

The Malicious Damage Act, 1861, under which accused was convicted, also provides (s. 68) a right of appeal on summary conviction limited to cases where the sum adjudged to be paid shall exceed £5 if the imprisonment exceeds one month.

By Criminal Justice Administration Act, 1914 (4 & 5 Geo. 5, c. 58), sect. 43, the section regulating the application of that Act to Ireland, sub-s. 11, a very extended right of appeal is provided "against a conviction" of a Court of summary jurisdiction "in respect of an offence," whatever may be the fine or term of imprisonment.

The governing words of sub-s. 11 of sect. 43, Criminal Justice Act, 1914, are an appeal, &c., "against a conviction of a Court of

summary jurisdiction in respect of an offence shall lie." Here, there is a "conviction" "in respect of an offence" alleged. Therefore, the right of appeal is expressly given against the "conviction"; the remaining words of the sub-section after "shall lie" do not affect the question of right of appeal.

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Counsel also referred to the definition of Imprisonment, Stroud, vol. ii, p. 991, and vol. iii (Prison), at p. 1552.

The Solicitor-General (James O'Connor K.C.) and Cusack, for the justices:—

There is no right of appeal given by the Children Act in such cases. Sect. 37 of the Criminal Justice Administration Act does not apply to Ireland. The right of appeal in Ireland (if any) is given by sect. 43, sub-s. 11, of the Criminal Justice Administration Act, 1914. This sub-section only gives a right of appeal where a fine is imposed or imprisonment awarded. Neither fine nor imprisonment has been awarded in this case; therefore, no appeal lies under sect. 43, sub-s. 11.

Detention in a reformatory school is not imprisonment. The Children Act, Part IV, 1908, carefully distinguishes detention in a reformatory school from imprisonment. See sect. 57, proviso; sects. 102, 106, and 107.

The judgment of the Court was delivered by Cherry L.C.J.

CHERRY L.C.J.:—

We are all clearly of opinion the magistrate was wrong in his decision in this case. The question is whether there is a right of appeal from a sentence imposing detention in a reformatory. A boy was convicted under the Malicious Damage Act, 1861 (24 & 25 Vict. c. 97), pursuant to the Children Act, 1908, and sentenced to detention in a reformatory. Mr. Swift refused to take the recognizances, because he held that there was no right of appeal. In the sections cited (7 Wm. 4, and 1 Vict. c. 25, sect. 27; 14 & 15 Vict. c. 92, sect. 23; 24 & 25 Vict. c. 97, sect. 68) the right of appeal was limited by the amount of fine or the term of imprisonment. Hence there was no appeal, if there was no fine and no imprisonment. The Criminal Justice Administration Act, 1914 (4 & 5 Geo. 5, c. 58), sect. 43, sub-s. 11, has altered that. [His

K. B. Div. Lordship read the sub-section] (1). My view of the section is
 1916. that it does not limit the right of appeal to cases where fine or
 REX imprisonment is imposed. The intention was to give the right
 (HIGGINS) of appeal in Ireland as in England in all cases of summary
 v. jurisdiction.
 JUSTICES OF
 DUBLIN
 METROPOLIS. We shall make an order to take the recognizances.
 Cherry
 L.C.J. Solicitor for the prosecutor: *John George Lidwell*.
 Solicitor for the justices: *The Chief Crown Solicitor*.

A. K. C.

(1) Sect. 43, sub-s. 11, of the Criminal Justice Administration Act, 1914, is as follows:—

“An appeal under section twenty-seven of the Dublin Police Act, 1837, section twenty-three of the Summary Jurisdiction (Ireland) Act, 1851, or section twenty-four of the Petty Sessions (Ireland) Act, 1851, against a conviction of a court of summary jurisdiction in respect of an offence shall lie whatever may be the amount of the fine or the term of the imprisonment imposed.”

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1916.

Nov. 3.

*Local Government—Public Roads—Repairs—Expenses—Excessive Weight—
Extraordinary Traffic—Public Roads (Ireland) Act, 1911 (1 & 2 Geo. 5, c. 5).*

Road authorities should have regard to modern requirements, and must make reasonable provision for motor traffic; a natural increase of volume in this mode of carriage, where its character is normal, does not amount to "extraordinary" traffic.

What is "extraordinary" traffic on a post-road, on part of which traction-engines are in use, considered.

Held, that the obligation of County Councils to keep public roads in good condition and repair is absolute under section 82 of the Local Government (Ireland) Act, 1898.

CIVIL BILL APPEALS heard by Gibson J. at the Londonderry Summer Assizes, 1916.

The actions were brought by the Londonderry County Council, under the Public Roads (Ireland) Act, 1911 (1 & 2 Geo. 5, c. 5), against the defendants, William MacCarthur and Daniel Cormie, for the recovery in each case of £10, being the amount of the extraordinary expenses which had become necessary for repairing a first-class road, leading from Claudy to Feeny in the county of Londonderry, by reason of the damage caused to the said road by the excessive weight and extraordinary traffic of traction engines and loaded wagons, the property of the defendants. The Recorder of Londonderry gave a decree for £20 against each of the defendants. The latter appealed, and the appeals were heard at the Londonderry Summer Assizes, 1916. The facts are set out in the judgment of Gibson J.

E. S. Murphy, for the plaintiffs.

Wylie K.C., for the defendants.

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GIBSON J. :—

In these important and difficult cases, in which the evidence has been of a contradictory character, I reserved judgment, to consider the authorities on the subject and the conclusions of fact deducible from the evidence. The action is under 1 & 2 Geo. 5, c. 45, and is brought to recover expenses of extraordinary traffic on a section of road some 400 yards long, lying between Claudy and Feeny. None of the authorities cited for plaintiffs is directly in point. What is extraordinary traffic is a question of fact. The present controversy relates not to the use of a side road off the main road, as in the *Barnsley British Co-operative Society, Ltd. v. Horsborough Urban Council* (1); *Geirionydd Rural Council v. Green* (2); or a sudden incursion of unexpected novel traffic on a road not able to bear it, as in *Mayo County Council v. M'Anish* (3), decided by Dodd J.; or the use of traction engines of unusual and excessive weight, as in *Kerry County Council v. Fletcher* (4), before Molony L.J.

With the exigencies of present-day business and the development of such conveyances, the use of engines with wagons is in certain localities a legitimate burden on roads which the road authority may be reasonably bound to provide for; and if the cause of the injury to the road surface results from not keeping the road up to its proper up-to-date standard, where the use of the road is legitimate and not unreasonable, there is no ground of complaint. But a council is not bound to make every road under their control able to carry such traffic. Each case depends on its special facts.

The peculiarity of this case is that it deals with a continuous post road running from Derry to Claudy, and thence by Feeny to Dungiven and Belfast. A section of 400 yards of this road between Claudy and Feeny passes over bog, and therefore, for the purpose of all vehicular traffic, by horses as well as by engines, requires more solid and expensive construction. The road between Derry and Claudy also, in places, is carried over similar bog; but it has been constructed in such a way as to be suitable for

(1) [1916] I. A. C. 291.

(2) [1909] 2 K. B. 845.

(3) 47 I. L. T. R. 120.

(4) 50 I. L. T. R. 86.

motor traffic. In three years £7000 has been spent on six miles of it. The bog difficulty is of the same kind, possibly greater. Motor traffic of extensive proportions for many years has been travelling over this part of the post-road; and it is not disputed that the engines and wagons so operating—much heavier than those of the defendants—are ordinary traffic, for which the county council must provide. Since 1912 motors have been used in the district beyond Claudy, and from the war the traffic has developed and increased. It comprises coal, manure, potatoes, and meal to and from Derry, and threshing-machines also use the road. The defendant Cormie carted timber as well.

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The plaintiffs' case is that, having regard to the nature of this piece of road, the expenditure required to enable it to carry engines, &c., and the recent character and volume of the traffic, they are under no duty to provide for it; that such traffic is extraordinary; that they have no money immediately available for the purpose; that the expense would come to £800 or upwards; and that the road has been seriously damaged by the defendants' engines and wagons. The injury was attributed to the pull of the wheels on the road.

The defence is that the road was insufficient to bear ordinary horse vehicles; that the traffic was such as, in existing conditions, the plaintiffs were reasonably bound to provide for; that the expense would not be more than £150; that such moderate outlay would be necessary to bring the road up to ordinary standard; that if it had been of such standard, no damage would have been caused by the engines, which, from their moderate weight and the width of their tires, would cause no more wear or mischief than common carts would; and that the ruts in the road were caused by the wheels of such carts, as the narrowness of such ruts was said to prove.

The county surveyor, Mr. Boddie, also alleged that the road was damaged by the engines being put on it after it was repaved by the road contractor, from not allowing sufficient time to consolidate it, a period of three months for that purpose being stated by him as necessary. Defendant's witnesses stated that less than three days would be sufficient for such consolidation. I do not accept Mr. Boddie's estimate.

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The question before me is confined to this small section of this post-road. After it leaves Feeny the road would be sufficient, save in places, to carry such traffic, but it does not appear that it was so used to any substantial extent; but a threshing-machine was brought over it—an occasional use from time to time.

The importance of the case to the neighbourhood is communication with Derry. It is contended that farmers there should enjoy the same conveyance facilities and advantages as those in Claudy, and that the road ought to be brought up to present-day reasonable requirements, like the portion between Claudy and Derry.

The road was admittedly in an unsatisfactory state for a long time, though it required exceptional care. When in the hands of the previous contractor, £96 was deferred out of £197 in 1914; and for three years, up to 1915, the deduction was large, over £150.

The road was then given to a new contractor, who had never acted in that capacity before. What exactly he did is not proved in detail, but he says generally the work was properly done, and that the road was shaken and cut with ruts by defendant's engines. It is not proved that he laid large stones underneath, necessary, according to defendant's witnesses, to make the road in this place fit to carry ordinary traffic with stability and safety.

I do not state the contradictory evidence in detail. Four witnesses were called for the plaintiffs: Mr. Boddie, the county surveyor; O'Neill, a surfaceman; Kelly, the road contractor; and M'Menamin, the driver of the county council's engine. No evidence from independent witnesses was produced, or complaint proved, on the part of the council or anyone, till the new contractor was employed. Five witnesses were examined for the defendants: Mr. Barnhill, Mr. Stewart; Mr. Willis, who used the traction-engine and wagons; the defendant, MacCarthur; and Ross, a neighbouring farmer, who proved frequent traffic since 1912 on, and the constant repairing of, the roads. The weights were much less than many of those on the Derry and Claudy portion. The dimensions of the engine-wheel tires were six inches wide front, twelve inches behind; of the wagons, four and six inches wide. The width of an ordinary cart-wheel

is some two inches or three inches. Mr. Barnhill states the ruts he observed when he saw the place were all caused by cart-wheels, with horse-tracks between, and could not have been caused by engine-wheels, from the small size of the ruts. According to him the downward weight-thrust would not, from the width of the tires, allowing so much bearing-capacity for each inch, be more than in an ordinary cart with two-inch tires. The driving-wheel is what, he says, makes the difference.

Both he and Mr. Stewart agree that the road-crust, one and a-half to four and a-half inches thick, was too weak for ordinary traffic; that a foundation of large stones, six inches deep, over the peat, would be necessary; and that the road if restored with proper crust and foundation would be adequate. Mr. Stewart described the traction traffic between Strabane and Derry, where the road is a second-class road, for a considerable time past, passing in places over bog ten feet deep, with heavier engines. He considered the road by Claudy "magnificent" up to the 400-yards pitch, and good again beyond it, though part required to be re-surfaced.

Mr. Miller, who has been employing MacCarthur to draw for him to and from Derry since early in 1913, corn, coal, and coke, and who lives two and a-half miles beyond Claudy, states carts always rutted the road there. His traffic, after passing the section in dispute, went to his premises by a second-class road, where it proceeded all right. MacCarthur lives three miles beyond Claudy, and got his engine in 1912. There are four engines on the road, one owned by Ferguson. Mr. Thompson, who resides six miles further on, gets a threshing-machine over the road.

After much consideration I have come to the conclusion that the plaintiffs' case, presented before me with fuller evidence and examination of authorities than before the learned Recorder, has not been established, and that the decrees must be reversed. The road, a continuous post-road, was neglected and in an unsatisfactory state when Kelly took his contract. What was done fell short of making it fit for ordinary traffic. A moderate outlay would have been sufficient, but there may be now no available extra funds for the purpose. The obligation of the county council to keep the road in good condition and repair is absolute under sect. 82 of the Local Government Act. I am not satisfied that,

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C.B. Appeal. had the road been properly maintained in such a way as to meet the additional difficulty from its being over bog, there would have been any substantial damage done by the traction proved. The new mode of carriage has been going on for some years without complaint from anyone, and conducted with engines, &c., much less weighty and wide than on the section of the same road from Derry to Claudy. Traffic of the kind, with the development of modern requirements, might and ought to have been reasonably expected and provided for. It has no doubt recently increased, but it has changed not in character but in volume. It cannot be considered as "extraordinary." It is the road rather which in this part is "extraordinary."

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It was no more difficult to make it fit than in the Derry to Claudy section, where similar conditions existed. The case is not one where such traffic has been brought over a small country road where nothing of the kind would be expected, and the road would be manifestly unsuitable, or where there was a sudden irruption of special unusual traffic, or where the weights and strain were unusual and excessive. Traffic of this kind in the locality was or ought to have been in contemplation of the road authorities; natural and legitimate increase in such traffic would not be "extraordinary." Increase of volume where the character is normal is not within that term. Motor traffic must begin some time; when it is general, and has come into use on such a post-road as this, it must naturally grow. If motor traffic on this section was intrinsically improper when it began, why was it not complained of till this action?

The dispute has entirely arisen from the presence of bog—a difficulty surmounted in other parts of the same road. None of the cases where liability for extraordinary traffic was established is like the facts here, which come within the principles laid down in such cases as *Kilkenny County Council v. Hayden* (1); *Donegal County Council v. Robinson* (2); *Chichester Corporation v. Foster* (3) (where the judgments of Lord Alverstone and Wills and Darling JJ. are instructive), and *Ledbury Rural District Council v. Somerset* (4). The absence of funds for the moment does not relieve the county

(1) 46 I. L. T. R. 95.

(2) 48 I. L. T. R. 182.

(3) [1908] 1 K. B. 167.

(4) 31 T. L. R. 295.

council from their duty of maintaining the road in a condition fit to sustain traffic that might be reasonably anticipated; and they cannot make the defendants responsible for extraordinary traffic, because the road, by the plaintiffs' own default, has not been properly maintained. Meanwhile, while the road remains in its present somewhat unsatisfactory state, it will be the interest of all using it, farmers or motor owners, to be careful not to expose it to any strain on its capacity which can be reasonably avoided, especially in the winter months. The statutory duty, however, of the county council as to maintenance of roads applies to all times of the year.

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Solicitor for the plaintiffs: *B. H. Lane.*

Solicitor for the defendant MacCarthur: *W. Horner.*

Solicitors for the defendant Cormie: *Todd and Mark.*

C. L.

RE COLEMAN, A BANKRUPT.

K. B. Div. *Bankruptcy—Lease—Election by Assignee—Equitable Mortgage—Landlord—*
 1916. *Lessor—Lessee—Bankrupt and Insolvent Act (Ireland), 1857 (20 & 21*
 Nov. 17. *Vict. c. 60), sect. 271.*

The rule of practice acted on for several years in bankruptcy in Ireland, that the Court will not, in the exercise of its discretion, order an assignee in bankruptcy to elect whether or not he will accept a lessee's interest in a lease vested in a bankrupt, when it is subject to a mortgage, is not a hard and fast rule, but ought to be departed from in special circumstances.

The period of time within which the assignee will be ordered to elect depends on the circumstances of each particular case.

MOTION under sect. 271 of the Irish Bankrupt and Insolvent Act, 1857 (20 & 21 Vict. c. 60), on behalf of the lessor of premises in the city of Dublin, held by the bankrupt under a lease, for an order that the Official Assignee should elect within a limited time to take or decline the lessee's interest in the premises demised, and, in the event of refusal to take, for an order for possession of the premises.

The bankrupt, who had been adjudicated on 30th May, 1916, held the premises in question for a term of twenty-one years, at a yearly rent of £56. The lease contained a clause against assignment or sub-letting without the consent of the lessor. The lessee, without the lessor's consent, had sub-let the premises, and had also deposited the lease by way of equitable mortgage. By letter, dated October 6th, 1916, the lessor applied to the Official Assignee, requesting him to take or decline the bankrupt's interest in the lease, and he had not done so.

M'Gonigal K.C., for the lessor of the premises leased to the bankrupt, in support of the application:—

The assignee should elect in this case, as otherwise the lessor has no remedy for her rent, save against the bankrupt, who cannot pay. The lessor cannot sue the equitable mortgagee, as she is not an assignee of the lease. There is evidently no interest for the estate in the lease. But, if it is thought that there is, the Court can by its order give the assignee such time as it thinks reasonable, to find out whether it is in the interest of the estate to elect to take the lease. Under sections in some of the English Bankruptcy

Acts similar to sect. 271 of the Irish Bankruptcy Act, 1857, the assignees were ordered to elect: *Ex parte Vardy* (1); *Ex parte Clunes* (2); *Ex parte Banbury* (3). K. B. Div.
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A. F. Blood K.C., for the Official Assignee:—

The practice in England is in accordance with the authorities cited on behalf of the lessor, but it has been the settled practice in Ireland for many years that where the bankrupt's interest in a lease is mortgaged the Court will not make an order under sect. 271, but will leave the landlord to his remedy by ejectment or otherwise.

Sect. 271 does not confer any absolute right on landlords to obtain the order asked for, but gives the Court the widest discretion. The practice referred to appears to have been grounded on the view that if the mortgage was valid, it was not right that the Court should summarily put an end to the security by a proceeding to which the mortgagee was not a party. And, again, if his security was rendered worthless by the making of an order under sect. 271, the mortgagee could rank as an ordinary creditor, and thus throw a heavier burden on the estate, to the disadvantage of unsecured creditors.

The settled practice of the Court is a reasonable and proper one, and should be adhered to.

PIM J. :—

Nov. 17.

This application is made by the landlady of certain premises in Upper Dorset Street, Dublin, held from her by the bankrupt under lease dated the 25th of March, 1907, for a term of twenty-one years, for an order that the assignee do elect within such time as the Court may fix to accept or decline the bankrupt's interest in the lease.

The question for decision is, whether the Court should make such an order notwithstanding the fact that the bankrupt had deposited the lease by way of equitable mortgage previous to the bankruptcy.

Now, I am informed that in such circumstances it is the recognized practice of this Court not to direct the assignee to elect, and to leave the landlord of the premises to his remedy at law. That means that the landlord for about a year after the bankruptcy cannot recover the premises, and will, therefore, for that

(1) 3 M. D. & De G. 340.

(2) 1 Madd. 76.

(3) 7 Jur. 660.

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period, be at the loss of the rent which, if he could recover the premises, he might be able to get out of them.

There is no doubt that under sect. 271 of the Irish Bankrupt and Insolvent Act, 1857, there is power vested in the judge in bankruptcy to direct the assignee, no matter what the circumstances may be, to elect whether he will accept or decline the bankrupt's interest in land, and I am bound, in every case brought before me, to exercise my discretion in the matter, and in doing so I am also bound to consider the rights of the landlord.

In *Ex parte Banbury* (1), a similar point arose in England, and the Chief Judge (following *Ex parte Chunes* (2), in which case the assignees had been directed to elect) said there appeared to him so much good sense in the decision that he had no hesitation in following it, and he made an order on the assignees directing them to accept or decline the bankrupt's benefit in a lease, notwithstanding the fact that the lease had been deposited in the hands of a third party by way of security.

I am clearly of opinion that it is not just or right to lay down a hard and fast rule that, in all cases where there is an equitable mortgage of a bankrupt's interest in the premises, the judge should refuse to direct the assignee to elect. There are cases in which the assignee should be given time—perhaps a considerable period—to make full inquiry before he is put to his election, and there are other cases where he should be directed to elect at once. In every case the discretion of the judge should be duly and seriously exercised. Of one thing I am sure, and that is, that the judge has no right to refuse to exercise his jurisdiction, simply because if he waits something may turn up which will benefit the estate. That comes near gambling with other people's property, and seems to me to be a refusal of justice.

In this case I think the assignee should have a month to inquire into the circumstances of the equitable mortgage. He may, before that date, find it worth his while to elect to accept the lease, or he may not, but the order will be that he elect within that time.

Solicitors for the applicant: *Casey, Clay, and Collins.*

Solicitors for the Official Assignee: *Bennett Thompson and M'Neill.*

R. W. L.

(1) 7 Jur. 660.

(2) 1 Madd. 76.

ANNIE DENT *v.* PHILIP MAGUIRE (1).K. B. Div.
1916.*Tort—Seduction—Loss of Service—Case for Jury where Constructive Service of Child to Parent is alleged.*Jan. 25, 26.
Feb. 8.Appeal.

June 8.

A, a minor daughter of *B*, was employed as a general servant by *C*. On account of an ailment, by arrangement with her mother, she was sent home for a week for treatment, and during that time was seduced. Having returned to her mistress *C*, the latter dismissed her on her pregnancy becoming apparent. *A* returned to her mother who, being in poor circumstances, subsequently sent her to the Union, in the Infirmary of which she was confined.

Held, that during the week when *A* was seduced, she might be deemed to be in the service of her mother, and that the confinement in the Union was such an interference with *B*'s right to her service as to support the damage necessary to complete the cause of action.

The authorities in reference to seduction where there may be two contemporaneous services considered.

MOTION to set aside judgment entered for the defendant by Pim J. on the 6th December, 1915, and for a new trial of the action.

The plaintiff, by her statement of claim, claimed damages for the seduction by the defendant, on or about the 15th June, 1914, of Ellen Dent, daughter and servant of the plaintiff, whereby the said Ellen Dent became pregnant of a child, of which she was delivered on the 14th March, 1915, in consequence whereof the plaintiff lost the services of the said Ellen Dent for a long time, and incurred other expenses. The defence consisted of the usual traverses. Issue being joined on these pleadings, the case was tried before Mr. Justice Pim and a common jury of the city of Dublin, on the 15th December, 1915. The following are the material portions of the learned judge's report:—

“This action was tried before me and a common jury.

(1) Before GIBSON and DODD JJ.

K. B. Div. Mr. T. J. Smyth appeared for the plaintiff, and Mr. M'Loone K.C.
 1916. and Mr. H. L. L. M'Cann appeared for the defendant. The evi-
 DENT dence is appended. At the conclusion of the case Mr. M'Loone
 v. asked me for a direction on the ground—1, that the plaintiff's
 MAGUIRE. daughter, Ellen Dent, was not in the service of the plaintiff at
 the time of the seduction, and, 2, that Ellen Dent was not in
 such service at the birth of the child. The following cases were
 cited to me:—*Barnes v. Fox* (1); *Whitburn v. Williams* (2);
Thompson v. Ross (3); *Gladney v. Murphy* (4); *Hedges v. Tagg* (5);
Long v. Keightley (6).

"I directed the jury to find for the defendant on the ground
 that there was no evidence of the girl's service with the plain-
 tiff at the date of the seduction; but I refused to accede to
 Mr. M'Loone's request to direct them that there was no evidence
 of the service at the date of the birth. The following evidence
 was given:—

"Nellie Dent.—'I am a daughter of the plaintiff. My father
 is dead. I have two brothers at the war, and two brothers and
 two sisters at home. I am twenty years of age. In 1914 I was
 in the service of Mrs. Drought. I was living there as general
 servant. On the 25th May, 1914, I went to the Dental Hospital
 to make an appointment. It was arranged that I should return
 there on the 9th June. It was further arranged between my
 mother and Mrs. Drought that, from the 9th June, I was to stop
 with my mother for a week, and longer if my teeth were not then
 all right. I went, on the 9th June, to the Dental Hospital with
 my mother. I then went straight home with my mother. The
 defendant is a baker. I have known him since I was sixteen.
 I occasionally went out with him; my mother knew this. I met
 the defendant during the week I was at home. On the 15th
 June we went up Butterfield Lane. We went into a field. We
 were there about an hour in all. He there made little of me. On
 going down the lane we met Mrs. Byrne. She asked me when
 I was going back to my mistress. I said I was going back on

(1) [1914] 2 I. R. 276.

(2) [1901] 2 K. B. 722.

(3) 5 H. & N. 6.

(4) 26 L. R. Ir. 651.

(5) L. R. 7 Ex. 283.

(6) I. R. 11 C. L. 221.

the following day. On the following Thursday I again saw the defendant. I did not see him again until I came back from the sea-side, at the end of July. I walked out with him again a week after I saw him. I told him of my condition. I told him I thought I was pregnant. He laughed it off. On the 7th October I went to the Meath Hospital, and was examined, and was told that I was pregnant for three and a-half months. I told my mother in November. I went back to my mother's home in October, and left again on the 14th December for the South Dublin Union, where I was delivered of a child in March, 1915. The defendant was married on the 15th February, 1915, to his former landlady, in Berkeley Road Chapel.'

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"Cross-examined.—'I stated to the registrar that Philip Maguire was the father of the child. I was with Mrs. Drought from the 24th November, 1913, until October, 1914. Before that I had been two years in service in England, and I was at home, after leaving my English service, for about two months before I went to Mrs. Drought. I was then working in the Laundry.'

"Mary Byrne.—'I know Nellie Dent and the defendant. I recollect the 15th June. I met them in Butterfield Lane between 7 and 7.30 p.m. I spoke to Nellie Dent, and asked her had she not gone back to her situation. She said she was going back the next day. The defendant was with her.'

"Anne Dent, the plaintiff:—'I am Nellie Dent's mother. The girl always helped me until she went to England. She lived with me after coming back from England until she went into the service of Mrs. Drought, about two months. The defendant was in the habit of walking out with my daughter. I was present when her mistress told her she should get her teeth settled. I was also with her at the hospital. It was arranged that she was to stop with me while under the treatment. She remained with me from the 9th to the 16th June, and assisted me in the house. Mrs. Drought told me about my daughter's condition in October of the same year. On the 14th December my daughter went into the South Dublin Union. She was confined in March in the Union. I went to see Father Behan. I saw the defendant later and I asked him what he was going to do. He said, "This is done and cannot be undone," and told me I was to go back and he

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would come to some settlement. I could not find him afterwards before he was married, and I have never spoken to him since.'

"Nellie Dent was recalled by me, and said that the arrangement made with Mrs. Drought was that she, Nellie, was to get her teeth settled; that she was to get a week for this purpose, during which time she was to stop with her mother, and such further time as should be necessary for the settling of her teeth, but that she would not be taken back by her mistress if she was in the hands of the dentist very much more than a week. She said her wages were £12 a year, and that she was paid for the week she was away."

The learned judge gave judgment for the defendant, with costs, and ordered execution to issue, notwithstanding the Courts (Emergency Powers) Act, 1914.

The plaintiff's motion for a new trial was based upon the following grounds:—(a) That there was evidence fit to be submitted to a jury that the plaintiff's daughter was, at the time of the seduction complained of, in the service of the plaintiff.

T. J. Smyth, for the plaintiff:—

The plaintiff's daughter was an infant, a circumstance that strengthens the assumption of constructive service. The test is: was there evidence to go to the jury of loss of service to the plaintiff? The learned judge evidently thought there was a case for the jury on the question of service at the time of the confinement; and if there was service then, there was evidence to go to the jury as to the loss of service resulting from the defendant's wrongful act: *Long v. Keightley* (1); *Terry v. Hutchinson* (2); *Murray v. Fitzgerald* (3). The fact that the plaintiff did not contribute to the cost of the confinement is not material: *Long v. Keightley* (1); the parent's right of service is not lost by the child's temporary absence: *Griffiths v. Teetgen* (4); and the suspension of the master's service revives the imputed parental right to service by a minor. At least there was evidence here to go to the jury as to whether or not, in fact, there was such loss of service as the law requires to found the action.

(1) I. R. 11 C. L. 221.

(2) L. R. 3 Q. B. 599.

(3) [1906] 2 I. R. 254.

(4) 15 C. B. 344.

Mac Loone K.C. and *H. M'Cann*, for defendant :—

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The plaintiff's case on her proof was unsustainable. Her daughter's evidence was that she was in Mrs. Drought's service from November, 1913, to October, 1914. That in itself refutes the service to the plaintiff, which is at best constructive and imputed. A servant cannot "serve two masters" at one time; he cannot take service with a new master while his contract of service with another is subsisting, so there cannot be an actual service, as here proved, and at the same time a constructive service to another person.

[Dodd J. — It sometimes occurs that when a master is away on holidays his servants, though still paid wages and still his employees, take temporary service with other persons.]

But here the reason for and the nature of the daughter's residence with the plaintiff negatives service to the plaintiff. The peculiar arrangement made as to the medical treatment which is in proof negatives any service which is to be imputed from the relation of mother and child.

The plaintiff did not suffer any loss of service by reason of her daughter's confinement. Assuming that there was the relation of mistress and servant at the date of the seduction, that relationship was put an end to by the daughter going into the Union. That was a deliberate step taken three months before confinement, and the daughter's position as a pauper inmate of the Union was that of a person bound to do work for the guardians: 1 & 2 Vict. c. 56, s. 53; *Mooney's Poor Law*, p. 26. On the whole case, *Hedges v. Tagg* (1) and *Barnes v. Fox* (2) are against the plaintiff.

Smyth, in reply.

Cur. adv. vult.

(1) L. R. 7 Ex. 283.

(2) [1914] 2 I. R. 276.

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GIBSON J. :—

The difficulty of this novel and important case is enhanced by its having been at the trial dealt with as presenting a question of abstract law, irrespective of the particular circumstances, and several points, which were probably proved or not disputed, are not, therefore, fully before us. The exact terms of employment with Mrs. Drought, where it is stated that the girl was a general servant; the financial position of Mrs. Dent, obviously a poor person; the exact bargain with Mrs. Drought, under which Nellie Dent left her for a week; the nature of the teeth ailment (probably serious, as her return to Mrs. Drought was left uncertain); what she did when she was finally sent home in October; the state of her health when she went into the work-house, and the circumstances of that step, taken so long before her confinement; whether she was received as a poor person requiring medical aid, or, as defendant's counsel say, as an ordinary pauper; whether she was required to do any work under the regulations; and what time she returned to her mother's house (the fact of her return is not disputed); are all left unascertained by any evidence before us. The evidence as to the one act of intercourse was vague, but was accepted as sufficient. No question was asked as to its repetition.

The question or principle involved in our decision is outside any actual authority, and it is desirable before I discuss the points argued to say something as to the history and development of the law on the subject, which has undergone modifications with the advance of public opinion.

The original form of the action was in trespass for assault on the servant causing loss of servitium: Smith L. C., vol. i, notes to *Scott v. Shepherd*; and it was held that only damages for that loss could be recoverable: Sedgwick on Damages, p. 572, ed. 1858. Early in the last century, injury to the father's feelings and the shame were admitted to influence the assessment. So breach of promise to marry was not at first allowed to be proved. It is curious how, in pleading forms, criminal conversation resembled seduction: Chitty's Pleading, ed. 1831, vol. ii, pp. 855, 856, and 843. It in like manner averred assault, causing loss of consortium, but the loss was reckoned from the date of the injury done, and the

loss was the corruption of the wife's body and mind: *M'Fadzen v. Olivant* (1). In seduction the injury to chastity, though the basis of the action, was not actionable unless there was loss of service. At first the loss had to be actual, but later it was settled that constructive loss of service, at least in case of an infant, was sufficient: *Terry v. Hutchinson* (2); the judgment of FitzGibbon L.J., in *Murray v. Fitzgerald* (3); and the law is so stated in the text-books, such as Clerk and Lindsell on Torts, and Smith on Master and Servant. The father has an implied right to his minor daughter's service, though such right is of imperfect obligation. The father's right was displaced by a contract of service with someone else, but was not affected by his daughter's absence from home on a visit: *Griffiths v. Teetgen* (4); and the fact of the daughter having been confined away from home, without any expense to her parent, and possibly even without his knowledge (which might be contrived by the seducer), did not affect the loss of constructive service which the father was continuously entitled to expect, and which was made impossible by her illness during childbirth: *Long v. Keightley* (5). The service and loss of service may each be constructive. Loss of possibility of service is sufficient: *Murray v. Fitzgerald* (3). The action has developed from one to recover damages limited to loss of service (Sedgwick on Damages, p. 542) into one to redress a moral wrong. Proof, however, of some loss or possibility of constructive loss is still necessary, but it is to be noted that the injury to the parent's heart and disgrace for which compensation is given have no connexion with this loss of service proper. The action is now in character much more a parent's action than a master's.

Birth of a child during the service is the usual proof of loss, but it is not the only proof: *Barnes v. Fox* (6), *per Holmes L.J.* Sexual intercourse may cause illness and inability to serve: *Manvell v. Thompson* (7); *Boyle v. Brandon* (8). Where violence was used this might readily occur. So enticement, taking

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(1) 6 East. 387.
(2) L. R. 3 Q. B., at p. 602.
(3) [1906] 2 I. R., at p. 267.
(4) 15 C. B. 344.

(5) I. R. 11 C. L. 221.
(6) [1914] 2 I. R. 276.
(7) 2 C. & P. 303.
(8) 13 M. & W. 738.

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 1916. conception, would be actionable, and substantial damages could be
 awarded.

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When this form of action began service with two masters at the same time was probably unknown, but in modern times such distribution of service is not uncommon. Thus a mill-worker returning after her day's labours to her father's home, may be taken as in his service: *Ogden v. Lancashire* (1). Whether the free time is for portion of the week or month or year, the principle must be the same: *O'Reilly v. Glavey* (2), approved of in *Murray v. Fitzgerald* (3); nor would the position be different if the servant, after the original bargain, asked for and was given such free time, such modified arrangement being a new contract. The payment of wages without deduction during such free time does not alter the character of that partial freedom from contract duty. The father of a child residing with him during such period can, if she is then seduced, complain that his right is violated. Where, however, she was debauched while with her paying employer, he might possibly have no redress, for though the father's right may be in one sense continuous, it is reversionary in nature, and might not support trespass. *Rist v. Faux* (4) is so reported that the ground of the decision is doubtful.

A case put by my brother Dodd during the argument brings out the difficulty of two-fold service. It has been decided that absence by revocable licence or permission from the employer's business does not entitle the father to claim to be master, though the girl, when with him, does useful acts, and, being in fact free for the time being from her master's control and orders, might be regarded as rendering service. Suppose, however, during a gentleman's absence from home for some months, his staff are allowed to go to their homes, and a maid utilizes the opportunity to take a temporary engagement, during which she is seduced by a visitor. If finding out her condition and pitying her, the new employer kept her on till the child was born, could he not sue notwithstanding that her contract with her absent employer was in force and unbroken when she lost her chastity? It is the

(1) 15 W. R. 158.

(2) 32 L. R. Ir. 316.

(3) [1906] 2 I. R., at p. 261.

(4) 4 B. & S. 409.

immediate relation of master and servant that founds the action. *K. B. Div.*
 The new master is not bound to inquire or take notice of the 1916.
 previous employment, and even if the servant broke her previous
 contract that could not affect the rights of the second employer. *DENT*
v.
 What would be the rights of the second employer had the girl *MAGUIRE.*
 been enticed away and seduced without returning to him? Would
 he not be within the principle of *Evans v. Walton* (1)? *Gibson J.*

With regard to a holiday not provided by the contract of service, it may be given under circumstances from which a jury might infer a contract entitling the servant to stay away for the period allowed. A servant girl in Wexford, from illness in her family in Donegal, asks for and gets leave to proceed there and stay for a month. She or her parents pay for the expense of the journey. Could her master recall her at any time, and if she refused at once to return, at once legally complain that she had violated her duty, though she had acted on his assurance and spent money on the faith of it? So, if a delicate girl was sent to her home for six months, to be looked after and fed by her parents meanwhile, her kind mistress paying her wages but not her board meantime, might she not be regarded, especially if a minor, as filling a relation entitling her father to sue if she was wronged? What if the period allowed was a year and the intercourse and birth were within that time? In the multiform variety of relations in our complex society it is difficult to lay down any rigid universal rule. I doubt if any of the cases cited could be extended, for example, to ordinary holidays of school teachers or governesses which, according to usage, and without any express contract, are enjoyed without interruption. Whether the daughter spends her vacation altogether with her parents, or takes a day engagement with some one in the meantime, going home every evening, one would expect that a seducer enticing the daughter to elope should be deemed guilty of actionable wrong. I now turn to the two points discussed by counsel. First, was there evidence of constructive or actual service with *Mrs. Dent* when the intercourse took place? *Nellie* was a minor, whether twenty years old or any less age is immaterial, and her mother was her statutory guardian under the Guardianship of Infants Acts, 1886 (49 & 50

K. B. Div. 1916. *Vict. c. 27, s. 2*). As mother she had *prima facie* an implied right to her daughter's service when with her, unless such right was displaced in some way.

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The bargain proved might be regarded as tripartite, and in the joint interest of mistress, servant, and parent. Mrs. Drought gave up the right to the girl's service while she was away, and the mother was to supply shelter and food. What would be the situation if Mrs. Drought, on account of Nellie being kept by her ailment longer than the specified period, had discharged her? Defendant's counsel contend that the legal position would have been the same. A master is not entitled to dismiss a servant for illness, unless that illness is so long prolonged as to make termination of the contract reasonable. Might not a jury find that the bargain meant that the girl was to accept dismissal if she could not return within the prescribed limit of time? thus curtailing her present legal rights and supplying a possible consideration. The period of absence agreed on was contractual in character; during that time Mrs. Drought's rights were in abeyance; she could give no orders to Nellie to return before the expiration of the free time. The payment of wages without deduction is not inconsistent with Mrs. Dent's right to constructive service. The employer was *prima facie* legally bound to pay where this absence was lawful and agreed on, the serious ailment of the teeth founding the arrangement. I think, therefore, on the first point that Mrs. Dent might be looked on as enjoying implied or constructive title to her minor daughter's service, and that the direction in the defendant's favour on this point was wrong.

Secondly, assuming that the defendant's act was an infringement of the mother's rights, was there what the law contemplates as constructive loss of service or possibility of service arising from that act? If after Mrs. Drought sent Nellie home in October the plaintiff had her daughter with her till the child was born, it is admitted that there would be actionable loss. The interposed period of service with Mrs. Drought could not affect the mother's cause of action, with the seduction and birth both taking place when the duty of service was owed to the parent. The argument for the defendant is that the girl was sent to the workhouse long before the confinement; that while there, if an ordinary pauper,

she was subject to obligation, if able, to do prescribed work ; and that having been confined while she was in such position, there was and could be no loss to the plaintiff. I have already, however, pointed out that constructive loss of service necessary to complete this cause of action may be established without the father being at any money loss, and though the daughter is unable from distance from home to render any service. The loss is from injury to the plaintiff's right, which, when the birth occurs, he could not exercise if he wished to do so. He is deprived of the possibility of service : *Murray v. Fitzgerald* (1), where FitzGibbon L.J. quotes Pollock on Torts.

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Does a mother of a wronged daughter big with her first baby, tortured as she is and miserable with the apprehensions of child-birth anguish, and desperate from exposure of her shame, lose the right of action because from poverty, being unable to get medical care and nursing in her cabin, she has to send her child to some charitable or public institution ? Is not such cruel necessity imposed by defendant's vicious conduct rather a matter of aggravation ? Where the mother's implied right is not determined by a new service, may it not be regarded as continuing ?

Had Nellie Dent been admitted as a poor person under the Act of 1862 (Irish Poor Law Amendment Act, 1862, 25 & 26 Vict. c. 83, s. 3), the case would be the same as if she had gone to a lying-in hospital, and the absence of expense to the mother would be no answer to the action. Take it, however, that she was admitted as an ordinary pauper. Was not this on account of her condition and the prima facie desirability of supplying the attention and food which she could not get under the parent's roof ? Might not a jury so find on the evidence, especially in the absence of cross-examination ? Whether in her condition she was required to do some light work, and if so, what the work was, and when and how long she was in the hospital or infirmary does not appear. If during her stay she had to conform to workhouse regulations and was obliged to do some work as a matter of discipline rather than as in the nature of an equivalent for her maintenance, that was only the condition of the accommodation received ; it did not make her a servant of the

(1) [1906] 2 I. R., at p. 267.

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guardians or create any contract of service. She was free to go when she would. During her confinement she could not work, and was essentially a hospital patient. The constructive nexus between mother and daughter throughout remained unsevered, and the *animus revertendi* continued. It is said that she was in the same position as a prisoner. An enceinte inmate is very unlike such person. She went in of her own choice to meet an urgent necessity, and was free to leave when she could. She might pay for her food and lodging to some small extent by labour, but that does not take her out of the operation of her parent's constructive right, which in this case it was not intended to displace. I am aware of no authority or principle to support defendant's contention. I decline to decide, and decide, too, for the first time, that a parent wronged by the seduction of his daughter loses his right to redress, because on account of poverty the Union is the only asylum or refuge wherein, with any show of protection to health and life, his child is to bear the ordeal of child-birth, and that the wrong-doer can claim impunity by reason of a situation brought about by his own misconduct.

Joseph v. Corvander (1), quoted with approval by Lawson J. in *Long v. Keightley* (2), if well decided, not only supports my conclusion, but goes much farther. Lord Denman there decided that an action was maintainable where the seduced girl was turned out, the basis of the decision apparently being either that pregnancy affected her ability to serve; or, more probably, that a master is entitled to require his servant to be chaste, and if she goes wrong when in his service, may dismiss her, such dismissal being taken to be the natural and reasonable consequence of the male offender's act, which, in that view, would cause loss of service, and impose on the master the necessity of replacing the servant, a thing sometimes difficult and inconvenient. In this point of view seduction would resemble *crim. con.*, where the husband, complaining of loss of *consortium*, separates of his own will from his wife. The change of modern ideas in relation to this latter action is illustrated by the language of Lord Kenyon in *Weedon v. Timbrell* (3), where the King's Bench decided that a husband separated from his wife could not sue in respect of

(1) Noted in Roscoe.

(2) I. R. 11 C. L. 221.

(3) 5 T. R. 357.

subsequent adultery, there being no loss of *consortium*, so that she had *carte blanche* to misbehave as if she was not married at all. Though *Joseph v. Corvander* (1) has appeared in the successive editions of Roscoe, it is not mentioned in Woods and Ritchie's Digest as having been referred to in any English decision since.

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DENT
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Gibson J.

None of the authorities brought forward for the defendant applies to the circumstances, rights, and relations existing here, where Mrs. Dent had a constructive right to her daughter's service, and where there was no inconsistent service with another master subsequently. *Barnes v. Fox* (2) decided—1, that the master's service was throughout in effective operation; 2, that there was no loss of service, as the birth took place while such service with the master continued, the Lord Chancellor confining himself to the latter ground, while Cherry L.C.J. adopted the former. *Speight v. Olivier* (3), cited with approval in other cases, and followed in *Morgan v. Molony* (4), was not relied on in pleading or argument, and whether it could have been applied I need not consider. That case tends to help the plaintiff. A master, hiring a girl with the purpose of seducing her, and, when he succeeds, keeping her in his ostensible service, and concealing her state till she was delivered, would be plainly liable, though the parent was at no actual loss or cost; and it may be that the service to her father being deemed to continue, taking her into the seducer's pretended service would be an infringement of parental right within the principle of *Evans v. Walton* (5), though the seduction was not followed by pregnancy. In *Whitbourne v. Williams* (6) the decision was put on the ground that the master's right, as in *Hedges v. Tagg* (7), was not affected by his voluntary permission of absence; but it might have been rested also possibly on the seduction having been when the girl was in his immediate actual service at the time.

I think that, on the evidence as it stands, there was a case for a jury. The case was, unfortunately, treated as raising a dry

(1) Noted in Roscoe.
(2) [1914] 2 I. R. 276.
(3) 2 Starkie, 493.
(4) I. R. 7 C. L. 240.

(5) L. R. 2 C. P. 615.
(6) [1901] 2 K. B. 722.
(7) L. R. 7 Ex. 283.

K. B. Div. 1916. *DENT v. MAGUIRE.* Gibson J. question of law, and the special circumstances affecting the parties, and their relative rights, particularly the minority of Nellie Dent, were not considered. In any view, however (from the importance of the special circumstances to which I have referred having been overlooked by counsel), I should hold the trial unsatisfactory, and that there should be a new trial. What may be the result of such new trial may depend on new and further evidence, when the defendant can be examined. My judgment, so far as is possible, is confined to the existing evidence, on which a jury, drawing reasonable inferences, might, I think, find for Mrs. Dent.

The costs of the first trial being thrown away by reason of the untenable requisition, the plaintiff is, under our practice, e.g., *Pearson v. Mayor of Dublin* (1), entitled to the costs of that trial, as well as the costs of this argument. The costs of the new trial will abide the result.

DODD J. :—

I concur.

C. N. K.

June 8.

The plaintiff appealed to the Court of Appeal (2).

The Court, without calling on the respondent, affirmed the decision of the King's Bench Division.

Solicitor for plaintiff: *Gerald Byrne*.

Solicitor for defendant: *John Moran*.

R. ST. J. C.

(1) [1907] 2 I. R. 27.

(2) In the Court of Appeal, before SIR IGNATIUS J. O'BRIEN, Bart., L.C., and RONAN and MOLONY L.JJ.

NEWELL v. STARKIE (1).

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1916.

Tort—Malicious Abuse of Authority—Conspiracy—The Public Authorities Protection Act, 1893 (56 & 57 Vict. c. 61). April 3, 4, 5.
May 25.

In 1889 N. was appointed Inspector of National Schools at a progressive salary, "on the usual conditions," and to hold the position "during the pleasure of the Commissioners." Having been reprimanded on several occasions, he was deprived of increments of salary, suspended, and finally compelled to resign on a diminished retiring allowance.

In an action brought by N. against S., the Resident Commissioner of National Education, claiming damages for maliciously procuring and conspiring with others to procure the infliction on the plaintiff of alleged wrongs whereby his position and salary were prejudicially affected, and which finally resulted in his enforced retirement:

Held by the King's Bench Division, affirming Kenny J., that the Commissioners of National Education were a public authority, that their officers had duties to perform of a public nature, and that the Commissioners and their subordinates in an action for torts alleged to have been committed by them in carrying out their duties, were entitled to rely upon the protection afforded by the Public Authorities Protection Act, 1893 (56 & 57 Vict. c. 61).

Held also, by the King's Bench Division, that the Act applied to proceedings brought against a public authority by its subordinates.

TRIAL OF ACTION.

The statement of claim in substance contained two charges against the defendant—the one, of having "wrongfully and maliciously without just occasion or lawful excuse and in abuse of any authority vested in him, procured" the infliction on the plaintiff of the wrongs of which the latter complained—and the other, of having conspired with certain other named officials to procure the infliction of those wrongs. The latter were alleged to be:—1, depriving the plaintiff of certain increments of salary; 2, refusal of various periods of annual leave and sick leave; 3, refusal of access to the Board; 4, depression in rank and salary; 5, frequent censure, and subjecting him to a series of harassing and irritating acts; and, 6, compelling the resignation of his position as inspector.

(1) Trial at Nisi Prius—Before KENNY J., and a Special Jury of the City of Dublin.

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The statement of claim also alleged that the defendant on four different occasions, namely, December, 1902, January, 1907, and twice in April, 1910, had suspended the plaintiff from his position, and that he had also deprived him of the full amount of his pension, and these acts also were alleged to have been done wrongfully and maliciously, and in abuse of authority.

The defence, in addition to denials of the allegations in the statement of claim, pleaded that the matters complained of consisted of alleged "acts of neglect or default in the execution of the defendant's duty or authority as Resident Commissioner of Education in Ireland," and relied on the provisions of the Public Authorities Protection Act, 1893.

The facts, in so far as they are material to the present report, were as follows:—

In March, 1889, in the time of Sir P. Keenan as Resident Commissioner, the plaintiff was appointed to the position of Inspector of National Schools, with a salary of £250, rising by increments to £500. The letter of the Secretary to the Board intimating the appointment, dated 18th March, 1889, stated that the plaintiff had been appointed "on the usual conditions," and that he was to hold his position "during the pleasure of the Commissioners." The documentary evidence in the case showed that from at least the year 1895, when Mr. Redington was Resident Commissioner, the defendant's conduct had brought him into trouble with the head Inspectors of the Board, and with the Board itself. It was admitted that he was reprimanded in 1895 and 1896, and again in 1902, 1903, 1904, and 1907, that he had apologized for his conduct on more than one occasion, that before the defendant was appointed resident commissioner, the plaintiff's increments of salary had been stopped, that resignation was suggested to him in 1907, and that in April, 1910, he was actually suspended from duty. His conduct was brought before the Board more than once; and in 1910 a committee of inquiry into his case was appointed, consisting of the late Dr. Traill, Provost of Trinity College, Mr. Richard Bagwell, the late General Butler, and Mr. Waldron. They met on 17th May, 1910, the defendant not being present. The plaintiff attended, and, to use his own words, "mentioned how I had been treated." As a result

of this inquiry the plaintiff was asked to send in his resignation, which he did on 1st of June, 1910. He was awarded a retiring allowance of £147 6s. 8d. K. B. Div.
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At the close of the plaintiff's case the defendant asked for a direction on the grounds, amongst others, (1) that no evidence had been adduced in support of the contention that the defendant had procured the infringement of any rights of the plaintiff under his contract of service, and (2) delay in bringing the action which entitled the defendant to rely upon the Public Authorities Protection Act, 1893.

Powell K.C., Pigot K.C., and Maxwell, for the defendant:—

The charter of the Commissioners shows that they have public duties to perform, therefore they come within the Public Authorities Protection Act. [They cited *Greenwell v. Howell* (1); *Pearson v. The Corporation of Dublin* (2); and referred to Halsbury's Laws of England, vol. xxiii, p. 343, § 695.]

Serjeant Matheson K.C., Healy K.C., Dickie K.C., and Moonan, for the plaintiff:—

The defendant is not a public authority. There is no evidence of the delegation of any of the Board's powers to him: *Sharphington v. Fulham Guardians* (3); *Bradford Corporation v. Myers* (4); *Fry v. Cheltenham Corporation* (5); *Chamberlain v. King* (6). The Act does not afford protection to the Board as against its own officials. Where there is any question of malice the Act cannot apply. [They also referred to Halsbury's Laws of England, vol. xxiii, p. 344, § 696.]

KENNY J. directed a verdict for the defendant, and intimated that he would subsequently deal in detail with the points raised in a considered judgment.

Accordingly, the following judgment was delivered on May 25th:—

KENNY J.:—

This action is, to say the least of it, a singularly belated one.

(1) [1900] 1 Q. B. 535.

(2) [1907] 2 I. R. 27.

(3) [1904] 2 Ch. 449.

(4) [1916] A. C. 242.

(5) 5 Butt. W. C. Cases, 162.

(6) L. R. 6 C. P. 474.

K. B. Div. It deals with acts of the defendant down to the month of May, 1916. 1910, which are alleged to have been done to the grave prejudice and injury of the plaintiff, yet it was not launched until January, 1915, nearly five years after the causes of complaint arose. In the meantime—in June, 1914—the plaintiff had brought an action against the Commissioners of National Education, making, it would seem, somewhat similar allegations against that body to those charged against the defendant, Dr. Starkie. The statement of claim in that action was taken off the files of the Court by order of the King's Bench Division, on the ground that it disclosed no cause of action, whereupon the present action was commenced.

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Kenny J.

The plaintiff had been an Inspector in the service of the Commissioners of National Education in Ireland, from March, 1889, to May, 1910. The defendant is now and has been since the year 1899 the Resident Commissioner of the latter body. The nature of his duties as Resident Commissioner do not appear from any official document given in evidence, nor was there any formal proof of a delegation to him, or to any of his predecessors in the office of Resident Commissioner, of the powers of the Commissioners, though Mr. Healy, in his opening address, stated that it appeared from evidence given by the defendant before a Viceregal Commission that a resolution of the Board was passed on the 7th January, 1902, that all matters of principle were to be decided by the Board, and all other matters by the Resident Commissioner. I state this inasmuch as the point was made with great vigour in the addresses of the plaintiff's counsel, that the defendant had usurped the powers and authority of the Board, and that when the "Board" was referred to in reports and correspondence it in reality meant the defendant, Dr. Starkie. However that may be, the plaintiff's case proceeded on the basis that the defendant exercised the very widest powers in his capacity of Resident Commissioner, and that in the exercise, or pretended exercise, of those powers he inflicted, both alone, and in combination with other officials in the service of the Commissioners, grievous wrong on the plaintiff.

In consequence of the line of argument adopted by the plaintiff's counsel, it becomes necessary to refer—and I shall do so very briefly—to the constitution, establishment, and procedure

of the Commissioners of National Education. It would appear that in the year 1831 grants of public money for the education of the poor were entrusted to the charge of the Lord Lieutenant of Ireland, to be expended on the instruction of the children of every religious denomination under the superintendence of Commissioners, then nine in number, appointed by the Crown, and styled "The Commissioners of National Education." In 1845 and 1861 charters were granted, under which the Commissioners were created a corporate body, with power to hold lands and to make leases, to erect and maintain schools, to sue and be sued in their corporate name, and to have a common seal. The power of appointing and removing Commissioners was vested in the Lord Lieutenant, and the total number was limited to twenty. Apparently the Commissioners were left to prescribe the machinery for carrying out the beneficent objects of the charters according to their discretion—at least I have not been referred to any statutory enactments or rules; and the plaintiff's case is that in no sense is this body the creature of statute. The further contention, quite unsustainable in my opinion, having regard to the charters, has been put forward, that the body is an illegal body, and that its acts, including the exercise (if any) of the power of delegation, are absolutely without authority. This is an extreme proposition at the end of seventy-one years from the incorporation of a body that in numbers of Acts of Parliament during that period has been recognized as the established head and centre of our system of national education in Ireland, and, in my opinion, cannot be sustained. Suffice it to say that it sufficiently appears from the proofs put in by the plaintiff in support of his case, that this Board has been conducting its business on settled and uniform lines with a considerable staff, and has been accepted by Parliament and the public as a legal body, exercising its powers without protest, and apparently in a legal and regular fashion. It is said that the Board have no right to delegate their powers, and that, no matter how multitudinous the questions may be that daily and hourly arise for decision, they were powerless to delegate any part of their authority to one of their body such as the defendant. I cannot agree to that proposition. It seems to me to be idle to suggest that this Board of Commissioners is not a great department of the

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1916. public and parliamentary grants of money.

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I asked Mr. Healy in the course of the case whether a minister of the Crown did not answer for the department in Parliament, and his characteristic reply was, that in the House of Commons the Chief Secretary confessed Dr. Starkie's sins. The documentary evidence in the case further shows that for very many years what I may call the everyday business of the Board has been conducted by one of their body who was named the Resident Commissioner. He receives a salary paid out of public moneys, while the service of the other commissioners is purely voluntary and unpaid. It would appear that Sir Patrick Keenan occupied the position of Resident Commissioner from about the year 1871. He was succeeded by Mr. Redington, who in his turn was succeeded, in 1899, by the defendant. The evidence also establishes that reports of subordinate officials and correspondence come before the Resident Commissioner in due course, and are initialed and otherwise dealt with by him.

It would seem that certain questions are reserved for the Board as a body, but no evidence has been offered as to the classification of subjects that may be dealt with by the Resident Commissioner alone and those on which the Board as a body have to express an opinion. It may be that evidence on this, amongst other matters, would have been given in support of the defendant's case had I not acceded to his counsel's requisition for a direction in his favour; but it seems to me that there is ample evidence in the case presented by the plaintiff to negative any suggestion of illegality in the proceedings of the Board or of the Resident Commissioner. I can see little difference between the functions and proceedings of the Board and Resident Commissioner and those of any great firm or public company established or incorporated to carry on a trading business and its manager or managing director; and if a subordinate officer accepts service under such a body, he, in my opinion, accepts the position subject to the right of supervision and control by the superior official.

I have elaborated this point at greater length than it, in my opinion, warrants, in deference to some of the arguments of plaintiff's counsel.

[His Lordship, having dealt with the evidence in support of the plaintiff's case, proceeded :—] *K. B. Div.*
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These are the broad facts of the plaintiff's case. He was examined, and I will only say with reference to his oral evidence that it did not advantageously supplement in his favour the documentary evidence. I did not understand Mr. Healy in opening the case to suggest personal malice towards the plaintiff on the part of the defendant. Indeed, he submitted that malice in the sense of vindictiveness or personal ill-will was not a necessary ingredient of either of the causes of action, and he put the latter on the basis of excess of authority; but later on Mr. Dickie, in reply to a question from me, stated that he relied on the existence of personal malice. The suggestion which he made, and in support of which there was no evidence whatever, was that the defendant in the year 1902 had delivered in Belfast an address of a public nature to which exception had been taken by a Catholic clergyman, a brother of the plaintiff; and the plaintiff in the course of his evidence deposed that since that incident "things were made unpleasant for him." This was the only hint—and it was only a hint without any proof—of ill-will on defendant's part; and whether it be substantial or the reverse, I regard it as not forming a constituent element in the plaintiff's causes of action.

The plaintiff's complaint is for wrongfully and maliciously, without just occasion or lawful excuse and in abuse of authority, procuring the infliction of wrongs to the plaintiff, and for conspiring with others to inflict those wrongs. The formula of liability in such a cause of action is embodied in Lord Macnaghten's judgment in *Quinn v. Leatham* (1), where he states that the violation of legal right committed knowingly gives rise to a cause of action. In different language the same principle is affirmed by Lord Lindley, at p. 535, where, in referring to *Lumley v. Gye* (2), he says that the principle which underlies that decision "reaches all wrongful acts done intentionally to damage a particular individual, and actually damaging him," and later on he observes that "intentional damage which arises from the mere

(1) [1901] A. C., at p. 510.

(2) 2 E. & B. 216.

K. B. Div. exercise of the rights of many is not actionable by our law." In
 1916. Ireland the Lord Chief Baron in his charge to the jury in the
NEWELL *Tallow Case* (1) lays down that an intention to do an act which is
v. to the detriment of another by infringing some right of the other
STARRIE. is a malicious act. It therefore seems to me that in order to
Kenny J. support a cause of action such as the present one, it is necessary to
 give evidence of—1, some legal right vested in the plaintiff;
 2, the infraction or violation of that right; and 3, the violation
 or the procuring of such violation knowingly and intentionally
 without lawful justification. The plaintiff's legal rights alleged
 to have been violated were such as arose from and were dependent
 on the nature of his contract of service with the Commissioners
 pursuant to the letter of appointment of 18th March, 1889.
 If the plaintiff had rights under his contract, he had also obligations
 towards not only the Commissioners as a body, but to those
 who were placed in authority over him by a body which I hold to
 be a perfectly legal body, clothed with authority to appoint and
 delegate, and, so far as I can see, no legal right of the plaintiff has
 been violated or infringed. The rights which he alleges to have
 been infringed were not in my opinion absolute rights, but rights
 which gained their force and character as rights from and were
 dependent on correlative obligations on the part of the plaintiff.
 In that sense I consider that no legal rights of the plaintiff have
 been violated. But if any right of the plaintiff has been infringed,
 is there any evidence adduced in support of the contention that
 such infringement was procured by the defendant knowingly and
 intentionally without lawful justification? Procurement necessarily
 implies action and exercise of the will in a particular direction,
 the direction here being the infliction of the wrongs or some of
 them set out in the statement of claim. There is no evidence that
 these alleged wrongs were brought about by the defendant; and
 if it could be said that he had "procured" them through being
 the instrument for preserving discipline and conveying censure,
 there appears to me to be a complete absence of any evidence to
 go to the jury that in so doing he acted knowingly and
 intentionally, without lawful justification. I purposely abstain

(1) Unreported. See the reference in Walker L.J.'s judgment in
Sweeney v. Coote, [1906] 1 I. R., at p. 114.

from dealing in any detail with the mass of evidence—oral and documentary—offered on behalf of the plaintiff, and confine myself to saying that I find nothing in that evidence to give any support to the contention that the defendant in any of his acts as the official of the Board knew or even thought that he was acting illegally or improperly, or violating any legal right of the plaintiff or prejudicially affecting him in some legal right. As to the cause of action for conspiracy, there is no evidence of any combination; and, indeed, I doubt if this branch of the plaintiff's claim was very seriously pressed.

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Kenny J.

I have now disposed of the first part of the case, and proceed to the consideration of the defence relying on the Public Authorities Protection Act. The statute affords protection for any act done in pursuance, or in execution, or in intended execution, of any public duty or authority.

On the plaintiff's case the several acts of which he complains as having been done by the defendant purport to have been done in pursuance, or in execution, or in intended execution, of the defendant's duty or authority as the servant of the Board in his capacity as Resident Commissioner. There is no evidence to show, and it is not suggested, that the defendant did the acts in any other capacity. The endorsement on the writ of summons in the case alleges that he did the acts "while Resident Commissioner," and the allegations in the statement of claim are all pointed at wrongful and malicious acts done by him and at abuse of his authority as such Resident Commissioner. It was contended that the defendant's duty was not a public one, but one merely arising from his relation to the Board in the management of what was practically a private concern, and that the public were in no way interested. *Sharlington v. The Fulham Guardians* (1); *Bradford Corporation v. Myers* (2); *Fry v. Cheltenham Corporation* (3); and *Pearson v. Corporation of Dublin* (4) were referred to.

I am of opinion, having regard to the view I stated in an earlier part of this judgment, that this Board could not be

(1) [1904] 2 Ch. 449.

(2) [1916] A. C. 242.

(3) 5 Butt. W. C. Cases, 162.

(4) [1907] 2 I. R., at pp. 33, 34,
46, 56, 81, 89.

K. B. Div. regarded as in the nature of a private concern; but, on the contrary, that it and its officers had duties to perform of a public nature. It was contended that if the action were against the commissioners they too would be debarred from relying on the Act. I cannot think so. And if the Commissioners were protected, their subordinates would necessarily be also protected in carrying out their mandates: *Greenwell v. Howell* (1), *per Collins L.J.*

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Kenny J.

I am, therefore, of opinion that the defendant not only purported to do the acts, but did them, in his capacity of Resident Commissioner, and that in so doing he acted in pursuance and execution of a public duty and authority.

It was finally contended that this question could not be dealt with at this stage of the case, and that it lay on the defendant to establish bona fide action on his part, and *Chamberlain v. King* (2) was cited for the latter proposition. That was a decision turning on the question of notice of action under the Larceny Act (24 & 25 Vict. c. 96, ss. 103, 113), where the act complained of—namely, false imprisonment—was admitted, and the case presented to the jury had been one of reasonable ground for the defendant's belief that a theft had been committed. The circumstances relied on as founding such honest belief were apparently in controversy, and, unlike the present case, there was prima facie evidence for the plaintiff, which necessitated counter-evidence of bona fide belief. I do not think it touches the present case.

I was not referred to any other authority on the subject of directing. I think, however, some light is thrown on the point by the case of *O'Dea v. Hickman* (3), where, in an action against the sheriff and his officer for wrongful execution of a civil-bill decree, the judge at the trial had directed a verdict for the defendant at the close of the plaintiff's case, on the ground of absence of notice of action. In the Court of Appeal FitzGibbon L.J. says:—"I am not aware of any precedent for holding that the defendants can take advantage, by way of nonsuit, of the absence of notice *where their acts were prima facie actionable*. Affirmative

(1) L. R. 1 Q. B. 535.

(2) L. R. 6 C. P. 474.

(3) 18 L. R. Ir. 233; 20 L. R. Ir. 431.

evidence of a bona fide belief by them in such a state of facts, as, if it had existed, would have justified their acts is necessary to entitle defendants to notice where, as here, the acts which they committed were, *on the plaintiff's evidence, illegal.*" Barry L.J. is to the same effect.

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Kenny J.

From these judgments I think the inference is clear that the cases when the judge should not direct are those in which the plaintiff has given some prima facie evidence of actionable wrong. I have already stated that, in my opinion, the plaintiff's evidence fails to establish a prima facie case of actionable wrong. He has offered no proof of want of bona fide belief by the defendant in the propriety of his acts; and, in these circumstances, I consider that I was justified in acceding to the defendant's application for a direction in his favour.

Nov. 8.

T. C. T.

NEW TRIAL MOTION.

The plaintiff applied to the King's Bench Division to set aside the judgment directed by Kenny J. for the defendant, and to order that a new trial of the action be had.

Serjeant Matheson K.C. and *Dickie K.C.* (with them *Moonan*):—

The Public Authorities Protection Act does not apply. This Board is not a public authority at all in the ordinary sense. Even if it is, the defendant was not acting towards the public at all.

If the action was against the Board itself, the Public Authorities Protection Act would not protect them. The action dealt with the duty of an employer towards his employee, and was really based on contract: *Fry v. Cheltenham Corporation* (1). If the Resident Commissioner is a servant, or a person to whom certain duties are delegated, he is in no better position than the Board: *Greenwell v. Howell* (2). It was the duty of the Board, as far as the public were concerned, to appoint inspectors, just in the same way as in *Pearson v. The Corporation of Dublin* (3) it was the duty of the Corporation to provide sewage works;

(1) 5 Butterworth. Comp. Cases
1912., p. 162.

(2) [1900] 1 Q. B. 535.

(3) [1907] 2 I. R. 27, at p. 33.

K. B. Div. and in the case of *Sharpington v. The Fulham Guardians* (1) it
 1916. was the duty of the Guardians to make provision for children.
NEWELL But once they entered into a contract the duty under it was a
v. private one towards the party with whom they made the contract ;
STARKIE. and in any proceedings founded upon that contract, the Public
 Authorities Protection Act could not apply.

Again, the duty must lie towards all the public : *Bradford Corporation v. Myers* (2). If the Act does apply, it lay on the defendant to go into the box and state that what he did, he did in his capacity of Resident Commissioner, and that he acted bona fide : *Chamberlain v. King* (3).

Pigot K.C. and *Maxwell* (with them *Powell K.C.*) :—

This is clearly a public body. All their duties are towards the public ; and one of their duties towards the public is to see that Mr. Newell did his duty properly. The Board would be protected by the Public Authorities Protection Act. The Resident Commissioner comes equally within the terms of the Act. *Chamberlain v. King* (3) does not apply, for in that case a prima facie case was established against the defendant, but no prima facie case has been established here. Besides, *Chamberlain v. King* (3) was decided in special circumstances under the Larceny Act.

Dickie K.C., in reply :—

The Larceny Act did not in any way affect the general principles of law set forth in *Chamberlain v. King* (3) which apply in this case.

CHERRY L.C.J. :—

[His Lordship, having held generally in favour of the defendant on the other points raised in the action, continued.] Even if there were a good cause of action, I am clearly of opinion that the case would be within the Public Authorities Protection Act, 1893. That useful Act provides that “where any action, prosecution, or other proceeding, is commenced in the United

(1) [1904] 2 Ch. 449.

(3) L. R. 6 C. P. 474.

(2) [1916] 1 A. C. 242, at p. 247.

Kingdom against any person for any act done in pursuance or execution or intended execution of any Act of Parliament, or of any public duty or authority, or in respect of any alleged neglect or default in the execution of any such act, duty, or authority . . . the action, prosecution, or proceeding shall not lie or be instituted unless it is commenced within six months . . ."

K. B. Div.
1916.
NEWELL
v.
STARKIE.
Cherry
L.C.J.

I am clearly of opinion that all the acts done by Dr. Starkie which are complained of by the plaintiff in this action were done as acts of public duty under and by virtue of his position as Resident Commissioner. He is clearly within the very words of the Act of Parliament, and, if he requires to do so, he can claim the protection of the Act. In my opinion Kenny J. was quite right in directing the jury to find for the defendant, and his decision should be affirmed on both points.

MADDEN J. concurred.

Solicitors for the plaintiff: *Redington & Sainsbury.*

Solicitor for the defendant: *J. M. Maxwell.*

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NORTH DUBLIN R. D. C. v. WALSH (1).

Oct. 31.
Nov. 1, 28.

Local Government—Public Health—Sanitary Authority—Rural District Council—Water Rate—Absence of List or Applotment-book—Validity of Rate—Magistrates—Case Stated—1 & 2 Vict. c. 56, sect. 65; 6 & 7 Vict. c. 92, sect. 10; 41 & 42 Vict. c. 52, sect. 66.

A Rural District Council in charging a water rate under the Public Health (Ireland) Act, 1878 (41 & 42 Vict. c. 52), sect. 66, is under no obligation, statutory or otherwise, to prepare a list or applotment-book such as is necessary to the valid charging of a poor rate, under the Poor Relief (Ireland) Act, 1838 (1 & 2 Vict. c. 56), sect. 65, repealed and replaced by the Poor Relief (Ireland) Act, 1843 (6 & 7 Vict. c. 92), sect. 10, and a water rate charged by a Rural District Council by a resolution only, without the preparation of such a list or book, may be a valid rate.

Rathdrum Rural District Council v. Saul, 39 I. L. T. R. 270, considered.

Case stated for the opinion of the King's Bench Division of His Majesty's High Court of Justice in Ireland, at the instance of the defendant, pursuant to the provisions of 20 & 21 Vict. c. 43.

At a petty sessions holden in and for the petty sessions district of Howth, County of Dublin, on Monday, 24th July, 1916, before Justices of the Peace, acting in and for the said county and district aforesaid, the North Dublin Rural District Council sued the defendant for the sum of £11 5s. 0d. for water supplied by the complainants to the defendant on his premises at Main Street, Howth, being a quarter's water rate from 31st March, 1916, in advance, £1 5s. 0d.; price or value of water supplied for year ending 25th March, 1916, £5; price or value of water supplied for year ending 25th March, 1915, £5.

The Justices made an order that £1 5s. 0d., the quarter's rate from 31st March, 1916, in advance shall be paid by defendant forthwith, in default of payment amount to be levied by distress and sale of his goods. No costs. Remainder of summons dismissed.

(1) Before CHERRY L.C.J., MADDEN and DODD JJ.

Murnaghan, Clancy K.C., and Jellett K.C.:—

The rate was properly made under sect. 66 of the Public Health (Ireland) Act, 1878 (41 & 42 Vict. c. 52); and although sects. 232 and 233 of that Act throw the rate-making authority, in this case, the rural district council, back upon the poor-law code, none of the forms prescribed in reference to poor rate is applicable to the rate in the present case. Sect. 65 of the Poor Relief (Ireland) Act, 1838 (1 & 2 Vict. c. 56), requiring that the particulars of every rate should be entered in a book, was repealed by sect. 10 of the Poor Relief (Ireland) Act, 1843 (6 & 7 Vict. c. 92), which empowered the Commissioners to prescribe the form of rate and the particulars to be entered in the rate-book.

The prescribed forms for county councils and urban district councils, respectively, are forms 47 and 48 in the schedule to the Public Bodies Order, 1904. A water rate is the only rate which a rural district council is authorized to make, and no appropriate form is prescribed for this rate. It would be impossible to enter the particulars of this rate in either of the forms prescribed. There is, therefore, no statutory form applicable in this case.

A water rate, unlike poor rate, is not imposed for a definitely fixed period, but only in respect of the time during which the water may be used by the occupier. The rate is simply in the nature of payment for an article supplied. Under sect. 67 of the Public Health Act, 1878, certain provisions of the Waterworks Clauses Act, 1847 (10 & 11 Vict. c. 17), are incorporated, including sect. 71, which provides that any occupier liable to the payment of water rate who gives notice of his intention to discontinue the use of the water, or who shall remove between two quarterly days of payment, shall pay the rate in respect of the premises for the quarter ending on the quarterly day of payment next after his quitting or giving notice of discontinuance. Again, under sect. 269 of the Public Health Act, 1878, notice of appeal against a water rate runs from the demand of the rate, and not, as in the case of poor rate, from the making of the rate.

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E. S. Murphy and Dickie K.C. :—

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This case turns on sect. 66 of the Public Health Act, 1878. That section provides that the rate is to be made, assessed, and levied in like manner in every respect as the rate out of which the expenses incurred by such sanitary authority in the execution of the Act are defrayed. These words are not in the corresponding section of the English Public Health Act, 1875, sect. 56. The “expenses incurred” are by sects. 232 and 233 payable out of the “poor rate” or as “part of the poor rate” according as they are special or general. A rate is legally made and enforceable when the name of the person liable is put into the rate-book: *Mogg v. Clarke* (1). If this rate is to be made, &c., in like manner as the poor rate, all the requisites for making good poor rate must be complied with as far as possible. What, then, are these requisites? Under 1 & 2 Vict. c. 56, sect. 70, there must be a notice of the publication of the rate, and an opportunity given to the public of inspecting the rate-book. By 12 & 13 Vict. c. 104, sect. 21, the rate-book is to be open for inspection by the public, and notice must be given of such opportunity for inspection. Sect. 65 of 1 & 2 Vict. c. 56, provides for certain particulars to be set forth in the rate-book. This section was repealed by sect. 10 of 6 & 7 Vict. c. 92. This latter section, or rather the part of it that dealt with these particulars, was itself repealed by the Statute Law Revision Act. The last-mentioned section referred to the particulars which should be put in the rate-book, and left it to the Poor Law Commissioners to prescribe the form of these particulars. That section expressly mentions “rate-book,” and that portion has not been repealed. The Poor Law Commissioners prescribed a form which was in use up to the time the Local Government Act came into force, and the Local Government Board have since published a form. No corresponding form has been prescribed for a rate levied by a rural district council. This was because that body had no rate to make except the rate in question, and up to the decision of *Saul v. Rathdown Rural District Council* (2) everyone thought the rate was to be made by the county council. As there is no prescribed form the rate must be made, levied, &c., in

(1) 16 Q. B. D. 79, at p. 82.

(2) 39 J. L. T. R. 270.

the same way as the ordinary poor rate, and, therefore, must follow the form prescribed for poor rate in so far as applicable. There must be a rate-book at common law. The names of the parties rated, the valuation, and the amount assessed on them must be set out. See *Rex v. Aire and Calder Navigation Co.* (1). In addition to all this there was no estimate as required by law. *Corporation of Worcester v. Droitwich Assessment Committee* (2). Sect. 66 is a complete code, and does not require the aid of the Waterworks Clauses Act, 1847: *Ex parte St. Sepulchre* (3). The decision in *Saul v. Rathdown Rural District Council* (4) dealt only with the authority to make the rate; and when Holmes L.J. speaks of "estimates," he was speaking of the estimates of the general rate and not of the rate in question.

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Cur. adv. vult.

The judgment of the Court was delivered by Dodd J. :—

Dodd J. :—

Nov. 28.

This is a case stated by the Howth Justices for the opinion of this Court. The plaintiffs sued the defendant at the Howth Petty Sessions for £11 5s., under three items, for water supplied by the complainants to the defendants on his premises at Main Street, Howth. Two of the items amounting to £10 have already been dealt with by this Court, and disallowed. The third item, "being a quarter's water rate from 31st March, 1915, in advance, £1 5s.," is the subject of the present proceeding. The defendant alleges that it was a condition precedent to the recovery of such rate that an applotment-book, or at any rate a list, should have been prepared beforehand, and that in the absence of such an applotment-book or list the rate was invalid.

As the argument proceeded it became evident, and I think it is now conceded, that the matter must be determined by the construction of the 66th section of the Public Health (Ireland) Act, 1878 (41 & 42 Vict. c. 52).

But the steps by which that conclusion or concession was arrived at must be set forth, as a consideration of them helps to throw light on the construction of the section.

(1) 2 B. & C., at p. 713; 4 D. & R.
253, at p. 256.

(3) 33 L. J. Ch. 372, at p. 376.

(4) 39 I. L. T. R. 270.

(2) I. R. 2 Ex. Div. 49, at p. 60.

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Under the 1 & 2 Vict. c. 56, sect. 65, it is provided that the particulars of every such rate (i.e. the poor rate) shall be entered in a book, in a given form. It is unnecessary to go more into detail. The rate there referred to was under the power of the guardians of the poor.

The section was repealed by sect. 10 of the 6 & 7 Vict. c. 92, and it was left to the Poor Law Commissioners to prescribe the form of the rate, and the particulars to be entered in the rate-book, which they did.

The powers of the guardians were by the Local Government Act, 1898 (61 & 62 Vict. c. 37), transferred to the county council "in so much of the county as is not comprised in an urban county district."

By sect. 28 there is transferred to the council of every *urban* district the business of the guardians as regards making, levying, collecting, and recovering the poor rate within the district.

If the rate sought to be recovered here were a poor rate, or part of the poor rate, or added to the poor rate, the provisions as to the making of a rate-book and setting out particulars would apply. And I cannot leave out of consideration that the case was opened for the defendant as if these provisions were obligatory by force of the Statute 1 & 2 Vict. c. 56, sect. 65. It is quite clear that this section, which was repealed, and sect. 10 of the repealing Act, 6 & 7 Vict. c. 92, does not apply to a *rural district* council. But though not obligatory by statute, it is contended that the provisions contained in these sections are obligatory by analogy to the poor rate, and at common law.

This simplifies the matter. Counsel for the defendant must establish conclusively that the obligation though not expressly enacted, is enacted by necessary intendment. This brings us to the construction of the 66th section of 41 & 42 Vict. c. 52, sect. 66 (1).

(1) "Where a sanitary authority supply water to any premises, they may charge in respect of such supply a water rate, to be assessed on the net annual value of the premises to be made, assessed, and levied in like manner in every respect as the rate out of which the expenses incurred by such sanitary authority in the execution of this Act are defrayed; moreover, they may enter into agreements for supplying water on such terms as may be agreed on between them and the persons receiving the supply, and may recover water rents or other moneys payable under such agreements in a summary manner."

Every word in the section, including the word "moreover," has its significance. And more significant still is the absence from the section of any provisions as to publishing any list, or as to the time at which the rate is to be assessed, or the establishment of any machinery of any kind, or the providing for the costs of carrying out the section. The first difficulty that suggests itself in construing the section is: What is the sanitary authority referred to which is to assess and levy this rate?

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There is a great deal to be said for the construction that the sanitary authority therein referred to is the county council, so much, indeed, is to be said that this Court (composed of the Lord Chief Baron, Mr. Justice Johnson, and Mr. Justice Kenny) so construed it. *Rathdrum Rural Council v. Saul* (1). The reasons given for that construction, and the reasons given by the Court of Appeal for not acceding to them, become of importance. The Chief Baron declares the object of the section to be "for the purpose of compelling those persons who actually obtain a supply of water to pay a certain sum for the special benefit they so enjoy, while the cost of the maintenance of the work is borne by the general body of the ratepayers." The only way of working sect. 66, according to him, was through the county council, as part of the poor rate. There was underlying the decision the assumption that this charge was a rate, such as the poor rate or county cess. The ground of the decision in the Court of Appeal was that it was not such a rate. Lord Justice Holmes says:—"The special water rate, under sect. 66, is a charge for special advantages conferred on those using the water, resembling water rents, which may by agreement be substituted for water rates, and I am at a loss to see how such a rate can be added to the poor rate." It was, in fact, because of its difference from the poor rate that the Court of Appeal decided it was to be assessed by a different sanitary authority from that which assesses the poor rate. When Mr. Murphy asks us to apply "by analogy" the provisions of the poor rate procedure, we have to bear this in mind. He asks us to imply and apply an analogy which the Court of Appeal has decided does not exist. I pressed him to say which of the many columns inserted in a modern county council rate-book under the

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form provided by the Local Government Board were so to be applied. He suggested three:—1, the name of the occupier; 2, the description of the premises; 3, the valuation of the premises. Each person to pay was entitled, he said, to have these particulars, both as regards his own premises and his neighbours' entered in a separate list made for the purpose. But, as I ventured to point out, these particulars are, in fact, enacted in the section. The Rural District Council must proceed upon the valuation lists already prepared by official authority, published in every conceivable way in the district, copies of which are to be kept for inspection in various of the county offices. A list such as that demanded here must be simply a copy of the Government valuation list. The Council could not alter or vary it. Even so it is urged there should be a special list copied from the valuation lists. That list would be merely a list of possible applicants. The rate is only upon such of those included in the valuation lists as may apply.

Speaking for myself, I accept unreservedly the principles laid down in the cases cited by Mr. Murphy, applicable to a rate. But, assuming this to be a rate within the meaning of those authorities, I think the law as it actually stands in Ireland, under statute, provides in this case for everything therein laid down as essential to a good rate at common law.

After all, the valuation of the premises is only a rough way of arriving at the quantity of water used. A spinster or lady in a £50 house might need less water than a large family in a £30 house. It is here the word "moreover" comes in. "Moreover, they [i.e., the sanitary authority] may enter into agreements for supplying water on such terms as may be agreed upon between them and the persons receiving the supply," and may recover water rents or other moneys payable under such agreements. In this part of the Act they may certainly differentiate.

The point was raised and dealt with in the *Rathdrum Case* (1). It was urged that no estimate had been included in the poor rate to cover this special water rate. The Lord Justice says it could not be done, as this water rate was not in existence when the poor rate was assessed. An estimate is a condition precedent to an

assessment. If there can be no assessment, there can be no applotment-book, no list. The only list could be one of persons likely to apply for water.

Mr. Murphy urged that a man is entitled to know upon what his neighbour is assessed. But, "moreover," the neighbour may make an agreement. It is not his neighbour who has a supply that he is concerned with. What he wants to do, and apparently has succeeded in doing, is to make the ratepayers who do not apply for a supply pay for the supply which those who use it have got. For, of course, if the defendant here succeeds, everyone using the water would also succeed.

Mr. Murphy falls back upon a subsidiary argument. The rate is to be "made, assessed, and levied in like manner in every respect as the rate out of which the expenses incurred by the sanitary authority in the execution of this Act are defrayed." The words "made" and "levied" create no difficulty. He must come in, if at all, under "assessed." But the meaning of that is made clear in the section itself. "It is to be assessed on the net annual value of the premises." His argument really upon this matter goes to sustain the decision of this Court in the *Rathdrum Case*, but once that decision is reversed the whole argument goes with it. By way of illustration, how is the assessment to be proved? The rate collector, in a poor rate case, must produce his warrant. It is not suggested any warrant could be issued here, or is necessary. How, then, prove the case? 1, By producing a resolution under the seal of the Board, assessing a rate on the net annual value of the applicant's premises; 2, by proving that the defendant was "an inhabitant entitled to demand a domestic supply of water"; and 3, by proving that he applied for and got the supply. On the whole, therefore, the Court is of opinion that there is no obligation upon the rural sanitary authority to make such a list as demanded here. There is none by express enactment. There is none by necessary or reasonable intendment.

In the case stated by the magistrates, which leaves nothing to be desired, though there is much to be admired in the way of clarity or compression, this is made the express ground of decision. "This latter [i.e., the valuation list] being quite adequate, and open to public criticism, and being the basis of the proposed

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K. B. Div. special tax, seemed to us sufficient, without the preparation of a
 1916. new list or applotment-book, which was a novelty to us."

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The question put to this Court by the justices is: "Were we correct in point of law in our determination as aforesaid?" To which the answer is, "Yes."

Dodd J.

The costs, of course, follow the event.

Solicitor for the plaintiffs: *Laurence J. O'Neill.*

Solicitors for the defendant: *Hunter & Burland.*

A. E. C.

WALL v. CAREW (1).

K. B. Div. Practice—Statement of Claim—Default of Pleading—Judgment—Substitution
 1916. of Service—Solicitor withdrawing Appearance—Service of Notice of
 Nov. 21. Motion.

Where the defendant's solicitor writes to the plaintiff's solicitor withdrawing from the case after appearance, the Court will deem personal service of the statement of claim upon the defendant good service for the purpose of enabling judgment to be marked, in default of defence.

NOTICE OF MOTION.

Application on behalf of the plaintiff to deem good the service of a statement of claim upon Edward Carew and Ellen Carew for the purpose of marking judgment against them in default of pleading.

The action was for a sum of £30, money had and received by the defendants for the plaintiff's use. The writ, which was issued on the 9th August, 1916, was served on the defendant, Edward Carew, on the same day, and on the defendant, Ellen Carew, on the 12th August, 1916.

An appearance was entered on behalf of both defendants on the 18th August, 1916, by Messrs. James O'Connor & Co., 57 Dame Street, Dublin.

On the 21st October Messrs. James O'Connor & Co. wrote a letter to the plaintiff's solicitor, that they had received a letter from their clients, the defendants, instructing them not to take any further steps in the matter, and that they (Messrs. James O'Connor & Co.) were not acting any further.

(1) Before GIBSON and KENNY JJ.

On the 2nd day of November, 1916, the statement of claim in the action was personally served on the defendant, Ellen Carew, and was served on the defendant, Edward Carew, the husband of Ellen Carew, by serving Ellen Carew at the residence of Edward Carew at No. 1 Dargle Road, Drumcondra, Dublin.

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It further appeared from a letter of Ellen Carew to the plaintiff's solicitor that Edward Carew had actually received the statement of claim.

No defence was delivered by either defendant.

The plaintiff's solicitor having attended to mark judgment at the King's Bench offices, in default of pleading, was informed that an application should be made to the Court, as the appearance entered by Messrs. James O'Connor & Co. on behalf of the defendants could not be withdrawn without leave of the Court.

Arthur Clery, for the plaintiff, applied *ex parte* to *Kenny J.* for an order deeming good the service of the statement of claim on both the defendants, for the purpose of enabling judgment to be marked. He referred to R.S.C.L., Order XIX, Rule 10, Order XII, Rule 6, *Wylie's Judicature Act*, pp. 242, 379.

KENNY J. directed the application to be made by motion on notice, giving leave to serve the notice of motion upon Edward Carew by serving Ellen Carew.

Counsel for the plaintiff now renewed the application to the Divisional Court, notice of the motion having been duly served on the defendants as directed.

There was no appearance for either of the defendants upon the motion.

The Court granted the application, deeming good the service of the statement of claim upon both defendants, and intimated that notice of such a motion should be served as a notice out of Court.

The following order was made :—

"It is ordered that the service already had of the statement of claim in this action be deemed good service thereof on the defendants without further motion."

Solicitor for the plaintiff: *John T. Hamerton.*

K. B. Div. THE KING (AT THE PROSECUTION OF JOSEPH O'NEILL) *v.*
 1916. THE COUNTY COURT JUDGE AND CHAIRMAN OF
 Dec. 14. THE QUARTER SESSIONS, AND OTHER THE JUSTICES OF
 THE PEACE IN AND FOR THE COUNTY OF TYRONE (1).

Justices — Jurisdiction — Title ousting jurisdiction — Trespass, Summary
Trespass Jurisdiction (Ir.) Act, 1851 (14 & 15 Vict. c. 92), s. 8—Claim
to a right impossible in law.

Where a defendant to a summons seeks to justify the act complained of as done in exercise of a right which could not exist in law, he cannot have "fair and reasonable grounds for a bona fide claim of right," and the justices should convict.

Where a defendant so seeks to justify a trespass and the justices convict, their order, though bad in form, will not be quashed on certiorari, as the Court will in such case exercise its discretionary power, and refuse to make the order absolute.

The prosecutor was convicted of trespass on the lands of C. He admitted the entry on the lands, but claimed it was made in exercise of a right of way. The right claimed was a public right of way from a public road across C.'s lands to a private bathing-place on the land of R., C.'s neighbour. The justices stated in their order that the right claimed was not "substantially supported by evidence."

Held, that the right claimed being one impossible in law, the conviction was good; and, even if the justices' order as made was bad in form, the Court in its discretion would not quash it on certiorari.

CERTIORARI.

MOTION to make absolute a conditional order for certiorari to bring up and quash a conviction of trespass made against the prosecutor by the justices of the peace for the County of Tyrone, sitting at Cookstown Petty Sessions, on the 8th September, 1916, and the order of the chairman and justices made at Dungannon Quarter Sessions, on the 9th October, on the appeal from the conviction at petty sessions.

On the 6th September, 1916, one Richard Charles charged the prosecutor in a summons with trespass on the lands of Tullagh, of

(1) Before CHERRY L.C.J. and GIBSON J.

which Charles was tenant. Prior to the hearing the prosecutor *K. B. Div.*
 served notice of justification of the act complained of, on the 1916.
 ground that it was done in exercise of a right of way. The
 complaint was heard at Cookstown Petty Sessions, when the
 prosecutor appeared as defendant personally, and admitted the
 act of being, at the date mentioned in the summons, on Charles's
 lands, but stated that his presence on the lands was in exercise of
 a right of way across Charles's lands to the farm of one Reid, and
 thence to the river Ballinderry. The prosecutor alleged that such
 right of way existed for the purpose of enabling persons to bathe
 in the river at a place in Reid's land. The bench having refused
 to allow the prosecutor to give evidence, the prosecutor called one
 James Lennox, who deposed that he and others had used a way
 across Charles's lands to Reid's farm and to the river for many
 years. The justices, having proof of Charles's ownership of the
 lands and the admission by the prosecutor of his entry on these
 lands, convicted, the curial portion of their order being as
 follows:—"The defendant pleaded a right of way, but, in the
 opinion of the Court, did not substantially support it by evidence.
 Convict defendant, and order him to pay for fine 1s., and for
 costs 2s. 6d." The prosecutor appealed to quarter sessions. The
 appeal was heard at Dungannon Quarter Sessions on the 9th
 October, 1916, when the defendant, who was professionally
 represented by Mr. Malone, his solicitor, gave evidence to show
 user by himself and others of a way across Charles's lands to
 Reid's farm and the river. His solicitor stated, in reply to the
 chairman, that the right claimed was a public right of way, and
 the chairman intimated that, if the justices had wrongly exercised
 jurisdiction, the proper remedy was by certiorari. The Court of
 Quarter Sessions affirmed the conviction.

The facts, as appearing in the affidavits grounding the motion
 for the conditional order and the affidavit showing cause, may be
 summarized as follows:—The prosecutor was a commission agent
 residing in the town of Cookstown, about half a mile from the
 lands of Charles, and owned no lands in respect of which he could
 claim a private right of way. Charles's farm lay between the county
 road and the lands of a man called Reid, through which latter
 lands the river Ballinderry ran, forming at one spot in Reid's farm

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a pool deep and suitable for bathing. There was a stile across the fence separating Charles's lands from the county road, and from that stile a path, partly paved, led to a dwelling-house, and thence to a well. In order to reach Reid's land from this well it was necessary to cross two fields belonging to Charles. There was a spot on the bounds fence between the two farms where it was possible to cross from one farm into the other. According to the prosecutor there was a stile at this spot; according to Charles there was no stile on his side, but there was a short ladder on Reid's side leaning against a tree in the fence. It appeared that from time to time some few persons had entered Charles's farm by the stile from the county road, and, without objection by Charles, had crossed that farm by the path and fields into Reid's land for the purpose of bathing in the river. In the summer of 1916 some local inhabitants organized a bathing club, and made a bathing place at the pool in Reid's farm, paying Reid £2 a year for permission to erect bathing-boxes, spring-boards, &c. As soon as the club was started the number of persons crossing Charles's farm greatly increased, and Charles put up a wire obstruction at the place where these persons crossed from his farm into Reid's holding. It appeared that there was no way except across Charles's farm by which the public or members of the club could reach the bathing place from the public road. The prosecutor tore down the wire obstruction placed by Charles in the hedge, and crossed Charles's farm, after being warned by the caretaker, and thus committed the act complained of as trespass.

The provision ousting the justices' jurisdiction under statute, in case of trespass, is contained in the Summary Trespass Jurisdiction (Ireland) Act, 1851, 14 & 15 Vict. c. 92, s. 8:—"Provided always that nothing herein contained shall extend to any case where the party trespassing acted under a fair and reasonable supposition that he had a right to go into or upon any such place."

The grounds upon which the conditional order was obtained were as follows:—

"(1) Joseph O'Neill in said conviction mentioned acted under a fair and reasonable supposition that he had a right to do the act complained of.

"(2) The justices in making said conviction acted without jurisdiction, as the jurisdiction of said justices was ousted by the bona fide question of title raised on the hearing of the summons and the appeal therefrom by said Joseph O'Neill.

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"(3) The justices in making said conviction acted in excess of jurisdiction, as the jurisdiction of said justices was ousted when the bona fide question of title was raised by the said Joseph O'Neill at the hearing of the summons and on the appeal therefrom."

Denis Henry K.C. (with him *Maguire*), for the prosecutor:—

Both the conviction and the order on appeal therefrom are bad on the face. If necessary we ask for amendment of the grounds of the application for the conditional order so as to raise this objection. The order of the quarter sessions can be quashed if bad on the face: *R. (Roe) v. Roscommon JJ.* (1).

The justices have in effect decided on the existence of the right under colour of which the prosecutor justified the act complained of; in other words, they decided a question of title, not the question whether the prosecutor had fair and reasonable grounds for the supposition of the right he claimed.

Wylie K.C. and *Murnaghan*, for the justices:—

The grounds upon which the conditional order was obtained were:—1, that the prosecutor had fair and reasonable grounds for the supposition of the right claimed, and 2, that once the question of title was raised the jurisdiction of the justices was ousted. The mere raising of a question of title cannot oust the jurisdiction of the justices; there must be fair and reasonable grounds for the supposition of the existence of the right claimed. The decision as to whether there are such fair and reasonable grounds is for the justices, and their adjudication being on a matter of fact cannot be quashed on certiorari. If the justices have wrongly decided on this question, the proper procedure to impeach the order is appeal by case stated: *R. v. Essex JJ.* (2); *Ex parte Smith* (3).

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No doubt the form of the justices' order here is peculiar, but the reasons given by them are surplusage. They were under no obligation to negative in their order the exception which the prosecutor as defendant was obliged to prove; and the language of the order, though unfortunate, amounts to nothing more than the statement that the justices found there were not fair and reasonable grounds for belief in the right claimed.

In any case it is obvious that there could not be any justification for the prosecutor's act, as the right he claimed is one not recognized by law. The prosecutor claimed a public right of way across private property to a private place; such a right is impossible: *Campbell v. Lang* (1); *Young v. Cuthbertson* (2); *Abercromby v. Fermoy Commissioners* (3), per Holmes L.J., at p. 313; *Brinckman v. Matley* (4); *Attorney-General v. Antrobus* (5); *White v. Feast* (6); *R. (White) v. Wicklow JJ.* (7); *R. (Kealy) v. Louth JJ.* (8); *R. v. Westmeath JJ.* (9).

Maguire, in reply, cited *R. (Donnelly) v. Kerry JJ.* (10).

CHERRY L.C.J.:—

This is an application to make absolute two conditional orders for certiorari to bring up and quash convictions of the prosecutor by the justices in the following circumstances:—

The prosecutor, Joseph O'Neill, was, in two summonses, charged by one Richard Charles with (a) trespass, and (b) malicious injury to property. In defence the prosecutor relied upon a claim to a right of way over Charles's land to the point where the act of alleged injury was done, that act being the destruction of an obstruction placed there by Charles to prevent the prosecutor and others from going on the land.

When the case was heard at petty sessions the justices appear to have misunderstood the exact point which they had to determine when this claim to a right of way was set up. This appears from the form of the order made by them, which is in the following

(1) 1 M'Queen 451.

(2) 1 M'Queen 455.

(3) [1900] 1 I. R. 302.

(4) [1904] 2 Ch. 313.

(5) [1895] 2 Ch. 188.

(6) L. R. 7 Q. B. 353.

(7) 1 N. I. J. 6.

(8) 35 I. L. T. R. 43.

(9) 15 W. R. 59.

(10) 2 N. I. J. 175.

terms, viz. :—"The defendant pleaded a right of way, but in the opinion of this Court did not substantially support it by evidence." *K. B. Div. 1916.*
 They then convicted the prosecutor, and fined him 1s.

Mr. Henry strongly contended that this order was bad in law, inasmuch as the justices had decided the wrong issue: that they had adjudicated upon the existence of the right claimed, instead of, as they ought to have done, merely deciding whether there was set up a bona fide claim to a right of way which the prosecutor had fair and reasonable grounds for believing to exist.

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Mr. Wylie, for the respondents, did not attempt to defend the form of the orders, but he contended that in the circumstances of this case the prosecutor could not have had fair and reasonable grounds for belief in the claim put forward, since he attempted to set up a claim to a right in a manner which was impossible in law—namely, to establish by user the existence of a public right of way from a public road to a private place.

It was decided in *Attorney-General v. Antrobus* (1) that the general public cannot acquire by user a public right of way from a highway to a national monument, or other object of public interest situate in private property, no matter what amount of user by the public is proved. In my opinion, therefore, Mr. Wylie's contention is right, and the prosecutor in this case put forward a claim which it was impossible for him to establish in the manner in which he attempted to do. The order of the justices was therefore right, and the application must be refused with costs.

GIBSON J. :—

I concur. The onus of establishing fair and reasonable supposition of right rests on the defendant, and the application of the proviso (as to such supposition) need not be negatived in the complaint or conviction.

The public right of way on foot here claimed was for the purpose of reaching a river, in which the local inhabitants were apparently allowed to bathe. Though there may be a public highway ending in a *cul de sac* or at private property, a path dedicated in perpetuity to enable the public to get to a bathing

K. B. Div. 1916. *place in private property would seem impossible: Attorney-General v. Antrobus* (1). There was no evidence that there was or could be any public right of bathing in the river. There was no proof of any local trust or dedication, if that were possible, to create any such bathing right. The only user of the way was by persons in the neighbourhood who wanted to bathe. The defendant, therefore, failed to bring himself within the proviso.

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Gibson J.

The addition to the order as to the justices' reasons was unnecessary; fairly construed it only indicates that the defendant had not satisfied the onus of proof.

Even if the order was wrong in form, it was clearly right in substance, and in the exercise of discretion the Court would decline to quash it, as the right claimed was not established, and was manifestly one which the law would not recognize.

Solicitor for the prosecutor: *E. J. Malone.*

Solicitor for the justices: *David H. Charles.*

C. N. K.

(1) [1895] 2 Ch. 188.

HARLEY AND OTHERS v. RUSSELL (1).

K. B. Div.
Probate.*Probate Practice—Suit to establish Will in Solemn Form—Earlier Wills
propounded alternatively by Reply—Fraud—Particulars.*

1916.

Dec. 18.

In an action brought by the executors to establish a will in solemn form of law, the defendant, a next-of-kin of the deceased, pleaded (inter alia) fraud on the part of the residuary legatee, and gave certain particulars.

On the application of the plaintiffs, the defendant was ordered to give the best particulars he could of the times when, the places where, and the names and addresses of the persons in respect of whom certain misrepresentations and false and malicious statements by the residuary legatee were alleged to have been made, and the names of the persons who were said to have been refused admittance to the deceased's house, with liberty to the defendant up to fourteen days before the trial (but not later without leave) to furnish such further particulars as they might be advised.

SUMMONS to fix the time and mode of trial.

The plaintiffs, George Turner Harley, Anthony Corley, and William Ogilvie Martin, issued a writ against James Russell as one of the next-of-kin of Adam Lowry, formerly of Ballymacreeley, County Down, who died on 12th April, 1916, claiming to be executors of the last will, dated 23rd January, 1914, of the said Adam Lowry, and to have the said will established.

In his defence the defendant, in addition to the usual pleas, alleged that the execution of the will was obtained by the undue influence and fraud of Ellen White, the residuary legatee named in the will. The particulars served with the defence were as follows:—The said Ellen White made certain misrepresentations and false and malicious statements affecting the character of the defendant and his daughter, Mary Thomasina M'Giffin, with the object of inducing, and thereby induced, the deceased to believe that they were persons who ought not to benefit by his will. The said Ellen White also by misrepresentations and false and malicious statements of and concerning the friends and acquaintances of the deceased, and otherwise, induced the deceased to believe that the

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said friends and acquaintances were persons of bad character and unfit persons for him to associate with, and thereby prevented such friends and acquaintances from associating with the deceased, by reason whereof the said Ellen White obtained such influence, control, and ascendancy over the deceased that he was not a free agent; and the said will was accordingly not the offspring of his own volition, but was obtained by the said Ellen White by the means aforesaid.

By notice of November 10th, 1916, the plaintiffs required the defendant to give further and better particulars of the misrepresentations and false and malicious statements referred to in the defence, when and where the said misrepresentations and false and malicious statements were made, and whether they were made orally or in writing; and also to furnish particulars of the manner, other than by misrepresentations and false and malicious statements, by which it was alleged that the deceased was induced to believe that his friends and acquaintances were persons of bad character, and unfit persons for him to associate with, and included in the words "and otherwise" in the said particulars; also the names of the persons referred to as the friends and acquaintances of the deceased in the said particulars.

The defendant in reply to the notice stated that the misrepresentations and statements referred to, all of which were within the knowledge of the said Ellen White, were made orally at various places and at various times during the seven years immediately preceding the death of the deceased, principally at the deceased's own residences at Ballymacreeley and at Ballygoskin, County Down, the full particulars of which were not at the time within the defendant's knowledge; and that the words "and otherwise" in the defence included, so far as was then within the defendant's knowledge, the refusing or delaying admittance to the deceased's house of relatives and friends of the deceased who called to see him, such friends including Mr. Fred. Boyd, Rev. William Russell, and others whose names were not then known to the defendant; and stated further that he would rely, in support of the fraud alleged in the defence, on such particulars thereof as should be deposed to in the examination or cross-examination of the witnesses at the trial.

The plaintiffs by their reply joined issue, and in the alternative set up two prior wills of the deceased, dated respectively 6th December, 1911, and 12th October, 1912, of both of which the plaintiff, George Turner Harley, was the surviving executor, and asked (in the event of the will of 23rd January, 1914, being condemned) for probate of the will of 12th October, 1912, or, in the alternative, of the will of 6th December, 1911.

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By his rejoinder (delivered pursuant to leave of the Court obtained *ex parte* (1)) the defendant pleaded to the two last-mentioned wills the same pleas, and gave the same particulars of fraud as in his defence to the will of 23rd January, 1914.

By their surrejoinder (delivered pursuant to leave of the Court obtained *ex parte*) the plaintiffs joined issue.

The plaintiffs, in the summons to fix the time and mode of trial, also applied for an order for further and better particulars of the charges of fraud made by the defendant.

Whitaker K.C. (with him *Chambers K.C.*, and *Harley*), for the plaintiffs :—

As fraud is alleged by the defendant, the plaintiffs are entitled to know what case they have to meet; and for this purpose they are entitled to know the nature of the fraud alleged, the circumstances in which it was committed, and the names of the persons referred to in the particulars given by the defendant as the friends and acquaintances of the deceased. The particulars already given by the defendant are not a sufficient compliance with the plaintiffs' notice. [He referred to *Kelly v. Kelly* (2), and also to the "Annual Practice," 1917, p. 342, *sub tit.* "Fraud," and the cases there cited.]

Powell K.C. (with him *Andrews*), for the defendant :—

The plaintiffs are not entitled to know the names of the defendant's witnesses, and this is in effect what the plaintiffs are asking. The defendant has given the best particulars that are at present within his knowledge. [He cited *Marshall v. The Inter-Oceanic Steam Yachting Co.* (3).]

(1) See Order xxiii, r. 3,
R. S. C. Ir., 1905.

(2) 23 L. R. Ir. 136.

(3) 1 T. R. 394.

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MADDEN J. ordered the defendant's solicitors, within ten days, to furnish in writing to the plaintiffs' solicitors such further and better particulars as they should be able to give of the times when, and the places where, and the names and addresses of the persons in respect of whom the misrepresentations and false and malicious statements were made as alleged in the 5th paragraph of the defence, and also of the persons other than Mr. Fred. Boyd and the Rev. Wm. Russell, who were included in the words "and otherwise" used in 5th paragraph, and gave liberty to the defendant's solicitors up to and including the 30th day of January, 1917 (but not after that day without the leave of the Court), to furnish the plaintiff's solicitors with such further particulars as aforesaid as they might be advised.

Solicitors for the plaintiffs: *H. Wallace & Co.*

Solicitors for the defendant: *Shean & Dickson.*

T. C. T.

COOLMOYNE AND FETHARD CO-OPERATIVE CREAMERY, LTD., v. BULFIN (1).

K. B. Div.
1916.

May 31.
June 16.

Appeal.
1916.

Nov. 13, 14,
15,
Dec. 11.

Restraint of Trade—Co-operative Creamery Society Registered under the Industrial and Provident Societies Act, 1893—Rules—Member bound to supply all the Milk of all his Cows—Prohibition of Competition—Public Policy—Breach of Contract—Damages.

Rules of a Co-operative Creamery Society registered under the Industrial and Provident Societies Act, 1893 (the shares being transferable only with the consent of the committee of the Society), bound the members not to sell the milk of their cows, produced within a certain defined area, "to any creamery other than a creamery of the society, or to any company, society, person, or persons who sell milk or manufacture butter for sale."

Held by the Court of Appeal, affirming the decision of the King's Bench Division, not to amount to an illegal restraint of trade, nor to create such a monopoly as to offend against public policy.

As a general rule, parties to a commercial agreement are free to enter into a combination to carry on a trade or business together for their own interest, provided such a course of action is undertaken without a view to injure others; and the law regards the parties as the best judges of what is reasonable as between themselves.

Agreements regulating the relations of parties *inter se*, while members of a trading association or partnership, or during a contract of service, and imposing a restraint on individual trading, must be differentiated from restrictive covenants in the case of such persons after they have ceased to be members of the association or partnership, or have left the employment.

Judgment of Holmes L.J. in *Tipperary Co-operative Creamery Society v. Hanley*, [1912] 2 I. R. 586, commented on.

CASE STATED for the opinion of the King's Bench Division by Gibson J. at the hearing by him at the Clonmel Spring Assizes, 1916, of a civil-bill appeal from a decree for £20 damages in favour of the plaintiffs given by His Honour the County Court Judge for the South Riding of Tipperary.

The plaintiffs, the Coolmoynes and Fethard Co-operative Creamery, Ltd., sought to recover from the defendant the sum of £20 as damages for breach of contract. The contract was

(1) In the King's Bench Division, before MADDEN and PIM JJ.

K. B. Div. contained in Rules 5 and 6 of the amended rules of the Cool-
 1916. moyne Co-operative Creamery, Ltd., of which the defendant was
 COOLMOYNE a member.

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The plaintiffs had originally carried on their business under the name of the Coolmoyne Co-operative Creamery, Ltd., under rules somewhat different from those relied on in the present case. On the 11th May, 1914, the Coolmoyne and Fethard Co-operative Creamery, Ltd., was established with amended rules which were duly registered under the Industrial and Provident Societies Act, 1893, on the 29th June, 1914. The amendment was designed, *inter alia*, to remove the difficulty caused by the decision in *Tipperary Co-operative Creamery Society v. Hanley* (1).

Under Rule 5 the society consisted of special members and of persons resident in, or occupying or grazing lands in certain townlands within a defined area adjoining the creamery. The operations of the society extended over eight to ten square miles of country, and 1400 or 1500 shares of £1 each had been allotted to 180 allottees. The centre of the creamery was at Coolmoyne, and there were three auxiliary branches. The only village in the plaintiffs' district was Fethard, with a population of 1600, where alone sales to private consumers would be made. The number of these consisting of artisans and labourers was left uncertain, but over ten families were supplied as private consumers.

Rule 6 (2) provided that "After the society shall have started a creamery for its members, no individual member of the society, so long as he continues a member thereof, who shall have milk to sell, the produce of a cow or cows kept or grazed on lands within the area defined in Rule 5, shall, without the written consent of the committee first obtained, sell any such milk to any creamery other than a creamery of the society, or to any company, society, person, or persons who sell milk or manufacture butter for sale. Any member of the society committing a breach of this rule shall pay to the society, as and for liquidated damages, and not by way of penalty, the sum of one shilling per cow per day for every cow's milk sold contrary hereto." Under Rule 6 (1), the society was bound to accept from all members milk delivered fresh and

(1) [1912] 2. I. R. 586.

in good condition at the creamery of the society, and to pay for it at the current price, to be fixed by the committee of the society, at the time of delivery. It was also bound to pay by way of liquidated damages the sum of one shilling per cow per day for every cow's milk not so accepted, to every member in respect of whom default was made.

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Under Rule 27 no member could divest himself of his shares without the consent of the committee.

The society was affiliated with the Irish Agricultural Organisation Society, whose operations extended throughout the entire of Ireland.

Rule 67 provided that any dispute arising between the society and its members should be submitted to the arbitration of the Irish Agricultural Organisation Society; but this rule was not relied upon by either side, or mentioned.

Rule 70 provided that the net profits, after payment of interest on loan capital, should, among other objects, be applied to the payment of interest on fully paid-up capital, not exceeding five per cent.

The defendant applied for shares on the 2nd of March, 1914, when the old rules were in force, and got an allotment on the 25th of August, 1914. The delay was caused by the change then about to be effected. The amended rules were printed in October, 1914, and he was sent a copy in December, 1914. He got no copy of the old rules. He ceased to supply milk from the 17th of September, 1914, his reason being that he could get higher prices elsewhere.

The plaintiffs issued a civil bill against him, claiming under rule 6 (2) £20 damages for breach of contract. The County Court Judge for the South Riding of Tipperary gave a decree for that amount, and on the hearing of an appeal at the Clonmel Spring Assizes, 1916, from that decree, Gibson J. stated the present case, the question for the determination of the Court being whether upon the facts the decree should be affirmed or the civil bill dismissed.

The arguments were similar to those in the Court of Appeal, reported *infra*.

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MADDEN J. :—

The plaintiffs in this case seek to recover from the defendant the sum of £20 as damages for breach of contract.

The contract is contained in rules 5 and 6 of the amended rules of the Coolmoynne Co-operative Creamery, Limited, of which the defendant is a member. Rule 6 (2) provides that no member of the company who has milk to sell, the produce of a cow kept within limits defined by rule 5, "shall, without the written consent of the committee first obtained, sell any such milk to any creamery other than a creamery of the society, or to any company, society, person, or persons who sell milk or manufacture butter for sale." A penalty is payable of one shilling per cow per day for every cow's milk sold contrary to the provisions of the rule. Under rule 6 (1) the society is bound to accept from all members milk delivered fresh and in good condition at the creamery of the company, and to pay for it at the current price, to be fixed by the committee of the society at the time of delivery.

The defendant is a member of the company, and he ceased to supply milk to the company on the 17th September, 1914, his excuse being that he could get higher prices elsewhere.

It has not been disputed that there has been a breach of the rules, and that the amount of the penalty has been correctly calculated. The case of the defendant is that the rules in question are not binding on him, inasmuch as they are in restraint of trade in a manner and to an extent which is unreasonable, and injurious to the interest of the public.

The objects for which the society was formed is stated in rule 4 to be to develop and improve the industry of dairying in Ireland, by carrying on the manufacture of butter, cheese, and other milk products. The company carries on the business of wholesale and retail dealers and agents for the sale of all descriptions of dairy, farm, and garden produce. It also supplied its members with all kinds of agricultural and other requisites.

It is evident that the general public are deeply interested in the successful carrying out of the main object with which a society like the plaintiff in the present case has been formed; the development of so important a business as the dairying industry in Ireland, and the manufacture of butter of a quality which will

command a high price in the market. It is obvious that the degree of success to be obtained by each individual society must depend on local circumstances, mainly on the degree of intelligence and integrity with which it is worked. On the question of the reasonableness of the rules with regard to the interests of the general public, the objects of the society ought not to be lost sight of. If the general public have an interest in the successful carrying out of the objects of a society, a rule of such a society, which operates as a limited restriction on trade, if it can be shown to be necessary to the successful working of the society, appears to me to hold a different position from a similar rule forming part of a purely commercial undertaking.

That the rules in the present case operate in restraint of trade is obvious. The defendant is restricted from selling his milk for the best price obtainable. That the price to be paid for the milk is fixed by the members, acting through a committee, is a matter to be considered on the question of the reasonableness of the restriction, but that the restriction exists is beyond doubt. The exact nature of restraint is important when we come to consider the extent to which the general public are affected by it. No member can sell milk produced within the defined area "to any creamery other than a creamery of the society, or to any company, society, person, or persons who sell milk or manufacture butter for sale." There is no restriction on the sale by any dairy farmer who is a member of the company of the milk produced on his farm to any person who may become his customer. He is simply prohibited from dealing with competing creameries, or with any person or company carrying on business in competition with the company of which he is a member. This would seem to be a reasonable condition of membership of any society of the kind. As regards the interests of the general public, there is not, and there could not be, any restriction contained in the rules, on the operations of any person or society carrying on operations similar to those of the plaintiff company. The company have no monopoly in the buying and selling of milk and the manufacture of butter. Competing companies or individuals are unrestricted in their operations, but they cannot carry them out with the assistance of members of the plaintiff company.

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K. B. Div. The Coolmoyne Creamery has a history which has an important
 1916. bearing on the decision of the present case. The rules in their
 COOLMOYNE original form rendered it imperative on each "milk-supplying"
 Co- member to deliver to the company all the milk produced from his
 OPERATIVE cows, except what was required for the use of his household. This
 CREAMERY obligation was unlimited in respect of area, and a member who
 v. had a farm in an adjoining or even in a distant county was
 BULFIN. placed under an obligation to deliver the milk produced by all
 Madden J. his cows at the office of the Coolmoyne Creamery. The rules
 contained no definition of the phrase "milk-producing members."
 Ambiguity and uncertainty were thus introduced into the rules,
 for the nature of the obligations imposed on a member depended
 on the meaning to be attributed to words which were capable of
 being interpreted in several different senses.

The Tipperary Creamery Society v. Hanley (1), a case in its facts similar to the present one, came before the Court when these rules were in force, when it was held that the claim against a member for non-compliance with his obligation to supply milk to the creamery was unfounded. It was held on appeal that the then existing rule as to supplying milk was uncertain in its character and unreasonable, and that it could not be enforced. The judgment of the Lord Chancellor proceeds on the ground that the obligation to supply milk to the company, being unlimited in regard to area, had a scope and operation altogether beyond what was required for the protection of the society, and was therefore unreasonable. Holmes L.J. concurred in this view; but his judgment was largely influenced by the uncertainty and ambiguity caused by the use of the phrase "milk-supplying members." The Lord Chief Justice, then Cherry L.J., was also influenced in his decision by the ambiguity of this phrase. "Three different interpretations of the rule being, therefore, in my opinion possible, I feel bound in this action for penalties to give the defendant the benefit of that one which is most favourable to him" (2). For this reason, and also because the rule was unrestricted as to the distance from the company's creamery within which it applied, he held that the rule was so uncertain in its character as to be unenforceable.

(1) [1912] 2 I. R. 586.

(2) [1912] 2 I. R., at p. 602.

As a consequence of this decision, the rules of the company have been amended. Rules 5 and 6 in the amended form are free from the objections to which I have referred. The obligation on the company to accept milk and on members to supply milk is restricted to the produce of cows grazed in a defined area adjoining the creamery; and for the phrase "milk-supplying member," the clear and unambiguous words "members having milk to sell" have been substituted.

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A further objection to the rules under consideration by the Court of Appeal was noticed by Cherry L.J. in these words:—"It makes the matter still worse that there is no provision in the rules enabling a member to withdraw from the society." As I read the judgment of the Lord Justice, his decision is not based on the absence from the rules of a provision determining whether and how members may withdraw from the society. This matter is not noticed in the judgment of the Lord Chancellor. Holmes L.J., referring to the Industrial and Provident Societies Act, 1893, says:—"The second schedule to the Act sets forth, amongst matters to be provided by the rules, a determination whether and how members may withdraw from the society; but nothing on this subject is to be found in the plaintiff's rules. It has been argued that this want vitiates all the rules; but although the omission is a violation of a requirement of the Act, I cannot hold that rules otherwise legal are by reason thereof made void" (1).

The provisions having been removed which, in the opinion of the Lord Justice, invalidated the rules, his judgment is a pronouncement in favour of the validity and effect of the rules in their present form. We have been asked in the present case to hold the rules to be unreasonable by reason of the absence of a provision for the withdrawal of a member. But on this point we are bound by the authority of this Court in *Tipperary Creamery Society v. Hanley* (2). As an authority on this question the decision of this Court is unaffected by anything that was said or done by the Court of Appeal.

We have been referred to *The Athlacca Co-Operative Creamery, Ltd., v. Lynch* (3), a decision which was pronounced by Roman L.J. in favour of the validity of the new rules. This was on an appeal

(1) [1912] 2 I. R., at p. 598. (2) [1912] 2 I. R. 586. (3) 49 I. L. T. R. 233.

K. B. Dir. to the Lord Justice as Judge of assize from the decision of the
 1916. County Court Judge. As a decision upon the hearing of a civil-
COOLMOYNE bill appeal, it is not binding on this Court. As an authority it is
Co- of the greatest weight, but it does not absolve this Court from the
OPERATIVE obligation of expressing an opinion on the questions submitted to
CREAMERY us by the learned Judge who heard the present case. I have
v. examined in some detail the provisions of the rules in so far as
BULFIN. they operate in restraint of trade. I can find nothing in them that
Madden J. is not, in the words of Lord Macnaghten in *Nordenfelt v. Maxim Nordenfelt Guns and Ammunition Co.* (1), reasonable "in reference to the interests of the parties concerned, and reasonable in reference to the interests of the public."

I am, therefore, of opinion that the question submitted to us should be answered by a determination that the decree of the County Court Judge should be affirmed.

PIM J. :—

If this case had been argued before us previous to the decision of the Court of Appeal in *Hanley's Case* (2), I should have felt some doubt whether the agreement entered into between the Tipperary Co-Operative Creamery Company and Hanley came within any of the categories under which illegal restraint of trade has been grouped. The agreement undoubtedly contained a restraint on individual trading, but it by no means follows that such a restraint is a "restraint on trade" within the legal meaning of the term. However that may be, the decision of the Court of Appeal is clear and explicit, and no question can now arise as to whether an agreement similar to the agreement in *Hanley's Case* (2) is or is not illegal and void. So long as the decision of the Court of Appeal stands, such an agreement is, in Ireland, both illegal and void.

The point for our decision is a simple one., viz., whether the Coolmoyne and Fethard Co-Operative Creamery, Limited, have, by their amended rules, cured the illegality which the Court found in their earlier rules, and have thereby rendered the rules innocuous, so far as any objection may be brought against them

(1) [1894] A. C. 535.

(2) [1912] 2 I. R. 586.

on the ground that they offend by being in unreasonable restraint of trade? *K. B. Div.*
1916.

In *Hanley's Case* (1) the objections raised were two: first, that the restraint was unlimited in respect of area, and, secondly, that it was unlimited in respect of time. COOLMOYNE
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Now, it will be observed in reading the judgments of the Judges who decided *Hanley's Case* (1) that the matter which the Court held to be unreasonable was not two restraints, each of which was in itself unreasonable, but a double restraint, which was unreasonable in its entirety. "It amounts, therefore," said the Lord Chief Justice, "to an absolute prohibition of the sale of milk by such members to any person whomsoever other than the plaintiff company; and, as a member cannot withdraw from membership, and cannot transfer his shares without the consent of the committee under rule 27, it may bind him for his whole life"; and again, "The effect of the rule which is sought to be enforced in the present case, if interpreted literally, is to prohibit the member who is bound by it from selling at any time, or in any place, a single quart of milk to any person whomsoever except the plaintiffs"; and again, "The defendant is absolutely prohibited from dealing in milk with any person other than the society, wherever he goes, and as long as he lives. Such a rule cannot be regarded as a reasonable one for a Court to enforce."

In the present case the rule found void by the Court of Appeal has been very greatly modified. Under the amended rule none of the objections made by the Court of Appeal as to area can be urged. Mr. Kinahan invited us to say that the modification, from the very nature of the case, was illusory. I cannot agree with him that that affects the reasonableness of the rule. It may be that none of those affected by the rule in its original form had any land outside the area fixed by the amended rule, or it may be that all of them had. The reasonableness or unreasonableness of the rule cannot be affected by the particular conditions of the covenants. It is enough if they were unreasonably bound, whether in fact they were for the moment affected or not. It seems unreasonable that a man with farms in Tipperary and Westmeath should be bound not to sell milk produced on either farm to anyone but a creamery

(1) [1912] 2 I. R. 586.

K. B. Dw. carrying on business in Tipperary; but I cannot say that it is unreasonable that a farmer having a single farm within a radius of ten miles of a creamery in Tipperary should bind himself not to sell milk to anyone dealing in milk except to the creamery. The covenantor is, if not one of the promoters, at least one of the proprietors of the creamery. He desires it to succeed, both for his own sake and for the sake of his co-proprietors, and if each member is to be left to act as it pleases himself in the matter of sales, it is doubtful if a new venture of the sort could succeed at all. It is not a general restraint on competition. Any person can compete. It is merely an agreement entered into between several persons of full age, and aware of what they are doing, that they will not individually sell to a competitor of the whole, so as to injure the business belonging to all. It is in its essence a limited restraint. In my opinion the covenant, as it now stands, is perfectly reasonable, and I am supported in that view by the authority of Lord Justice Ronan in the case of *The Athlacca Co-Operative Creamery, Ltd., v. Lynch* (1).

But it is argued that, admitting there is nothing unreasonable in the restraint so far as it deals with area, it is still unreasonable in the matter of time. The restraint may, it is said, last for the covenantor's lifetime—a highly unreasonable thing, found to be unreasonable by the Court of Appeal. Now, as I said before, I do not think the Court of Appeal held the limit of time, standing alone, to be unreasonable. They held, as I understand the judgments, the limitations as a whole to be unreasonable.

It is true that under rule 27 no shareholder can divest himself of his shares save with the consent of the committee; and, as long as he holds his shares, he is bound by his covenants. Such a rule is, *per se*, unobjectionable. It is a common article in Articles of Association under the Companies Acts, and it is introduced in order to protect the company from injurious transfers. In itself the rule is a wise precaution, and no objection could be taken to it if it were not for the restraint on sale which it effects in this case. It is true that a shareholder might be bound for all his life, although it is not very probable that he would be so bound. No committee could unreasonably withhold their consent to a transfer,

but they could withhold it if the proposed transferee was not a proper person to hold the shares. It is a restraint that is manifestly for the benefit of the covenantee, for the company could easily be seriously injured by transfers to persons who were not dairy-farmers. The covenantor could transfer his share at any time if he found a transferee who was a dairy-farmer. It is possible that he would not be able to transfer it at all if he did not find such a transferee. The covenantor knew the limitation on his powers when he took the shares, and he acquiesced in it, because it was for his benefit, and for the clear benefit of his co-proprietors. It might almost be said that it was necessary for the very existence of the enterprise. I cannot regard it as unreasonable.

There only remains the question of injury to the public. Can it be shown that the public are in anywise injured by the adoption of these amended rules? I think not. Perhaps it would be more true to say that if there is any injury, it is counterbalanced by an equal or larger amount of good. I am not now giving any opinion as to the value or otherwise of a co-operative society. I regard the creamery solely as a commercial venture, and, as such, it is of value to the community. Its rules may shut off a small amount of possible competition by preventing its members selling to competitors, but that is all. If it were unsuccessful, the consequent loss to a number of people would, in all probability, work far greater damage.

I cannot regard the rules or their adoption and working as in fact an injury to the public at all. In my opinion, the restraint, which is a very limited one, is reasonable in the interests of the covenantee, and does not offend against public policy.

The decree of the County Court Judge was, in my opinion, correct, and should be affirmed with costs.

Solicitor for the appellant: *G. A. Nolan.*

Solicitor for the respondent: *C. M. Barry.*

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Nov. 13, 14,
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Dec. 11

The defendant appealed (1).

Serjeant Sullivan K.C. and Gibson K.C. (with them Kinahan),
for the appellant:—

Rule 6 (2) amounts to an illegal restraint of trade, inasmuch as it binds the defendant, so long as he carries on dairying within the defined area, to supply all his milk to the society at a price which he cannot control. For all practical purposes the obligation is imposed upon him to sell to the society in perpetuity; and, therefore, the rules, as amended, do not get rid of the effect of the decision in *Tipperary Co-operative Creamery Society v. Hanley* (1). The agreement, in this case, comes into operation only when it is ruinous to the defendant. He is restrained from selling his milk to anybody else, although it may be to his advantage to do so.

In the two most recent cases on restraint of trade: *Mason v. Provident Clothing and Supply Company, Ltd.* (2), and *Herbert Morris, Ltd., v. Saxelby* (3), the principle laid down in *Nordenfelt v. Maxim Nordenfelt Guns and Ammunition Company* (4) has been qualified and extended. These cases recognize as fit to be protected by a covenant in restraint of trade only a man's own property, regarded in the most ancient sense of the term; and they lay down that anything infringing a man's freedom to carry on his own business in his own way is illegal. The effect of Lord Atkinson's judgment in *Morris's Case* (3) is that no person has an abstract right to be protected against competition per se in his trade or business.

What the Creamery Society seek protection against here is competition not only within the area defined in Rule 5, but throughout the whole of Ireland, because this society is bound to take one share in, and allot one fully paid up share to the Irish Agricultural Organisation Society, the parent body of all these local creamery societies. It becomes necessary, therefore, to examine the rules of the Irish Agricultural Organisation Society.

(1) In the Court of Appeal before SIR IGNATIUS J. O'BRIEN L.C.,
and RONAN and MOLONY L.JJ.

(1) [1912] 2 I. R. 586.

(2) [1913] A. C. 724.

(3) [1916] 1 A. C. 688.

(4) [1894] A. C. 535.

The object of the latter is "to organise agriculture and other rural industries in Ireland on co-operative lines." Societies in the position of the plaintiff society are entitled to membership, and at the annual meeting of the parent body the policy of the society may be defined or altered. It is obvious in these circumstances that there may be a restraint upon competition throughout the country. Rule 6 (2), which confers on the plaintiffs a protection against competition, is contrary to public policy.

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Carrigan K.C. and Sealy, for the respondents:—

There is no evidence to support the submission by the other side that the contract, in this case, involves a violation of public policy. The onus of showing that any contract is calculated to produce a monopoly or enhance prices to an unreasonable extent rests on the party alleging it, and if once the Court is satisfied that the restraint is reasonable as between the parties, the onus will be no light one: *Attorney-General of the Commonwealth of Australia v. Adelaide Steamship Co., Ltd.* (1), per Lord Parker, at page 796. Instead of stifling competition the plaintiffs have, as the case suggests, stimulated competition in the district.

A commercial agreement, such as we have here, regulating the relations of the parties whilst engaged together in trading operations, must be differentiated from agreements designed to regulate the conduct of persons who have ceased to be employers or partners. Here we have a society, of which the defendant is himself a member, engaged in the lawful enterprise of developing and improving the industry of dairying, and the parties who entered into the arrangement and subscribed to the rules must be regarded as the best judges of what is reasonable as between themselves. The principle applicable to cases like the present is that stated by Viscount Haldane L. C. in his judgment in *North-Western Salt Company, Limited, v. Electrolytic Alkali Company, Limited* (2), at page 471. He says: "When the controversy is as to the validity of an agreement, say for service, by which some one who has little opportunity of choice has precluded himself from earning his living by the exercise of his calling after the period of service is over, the law looks jealously at the bargain ;

(1) [1913] A. C. 781.

(2) [1914] A. C. 461.

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but when the question is one of the validity of a commercial agreement for regulating their trade relations entered into between two firms or companies, the law adopts a somewhat different attitude—it still looks carefully to the interest of the public, but it regards the parties as the best judges of what is reasonable as between themselves.” Further, at page 473 he agreed with what was said by Lindley L. J. in the *Nordenfelt Case* (1), namely, that while the interest of the public was no doubt adverse to monopolies and to restrictions on trade, its interest was “to allow its members to carry on those businesses which they themselves prefer, and to abandon or sell to the best advantage those businesses which for any reason they do not wish to continue.” This is not a case where the rule impeached imposes a unilateral obligation—mutual rights and obligations are imposed.

The law in regard to restraint of trade laid down in the *Nordenfelt Case* (2) has been accepted in every case on the subject decided since; see judgments in *Mason’s Case* (3), of Viscount Haldane L. C., at page 733, and of Lord Moulton, at page 742.

Gibson K. C., in reply :—

The amended rules are in substance the same as those considered and declared to be unreasonable in *Hanley’s Case* (4).

Cur. adv. vult.

Dec. 11.

SIR IGNATIUS J. O’BRIEN L.C. :—

The plaintiffs in this civil bill had originally carried on their co-operative creamery under rules which were subject to the objections which were pointed out in the case of the *Tipperary Co-operative Creamery Society v. Hanley* (4); and the rules were amended so that the defects which had been discovered should be remedied. The defendant, however, contends that the amended rules are still in some respects ultra vires and illegal; and, in particular, he contends that Rule 6 (2), a similar rule to that with which we had to deal in *M’Ellistrim v. Ballymacelligott Co-operative Agricultural Society* (5), was ultra vires.

(1) [1893] 1 Ch. 630, at p. 646.

(2) [1894] A. C. 535.

(3) [1913] A. C. 724.

(4) [1912] 2 I. R. 586.

(5) [1917] 2 Ir. 93.

The proceeding is taken by the creamery company for penalties arising under these rules, and, having been brought in the form of an ordinary civil bill, all questions are open, and any defences which may arise, whether of fact or law. It is accordingly necessary in this case to express an opinion upon some of the matters which were the subject of discussion in the former case, but which would not arise for definite decision on the motion. A member is bound, so long as he is a member of the society, and who shall have milk to sell, the produce of a cow or cows kept or grazed on lands within a limited area defined in Rule 5, not to sell any milk to any creamery other than the creamery of the society, or to any company, society, person, or persons who sell milk, or manufacture butter for sale. For breach of this rule he is liable to a penalty, described as liquidated damages, of one shilling per cow per day for every cow's milk sold contrary to the rule. On the other hand, by the first part of the rule, the society are bound to accept from him all milk produced by such member's cows kept or grazed on lands within the restricted area, provided it be fresh milk and in good condition, at the current rate fixed by the committee; and, in default, there is a corresponding penalty payable by the society, based on the number of cows' milk per day not accepted, so long as the default continues. The objection based on area, pointed out in *Hanley's Case* (1), is thus got rid of. But, among other matters, the defendant contends that there is practically no time limit by which, in the language of Holmes L.J., he can free himself by any independent action of his. He contends that on this ground, the period not being, as he suggests, limited, one of the grounds of decision in *Hanley's Case* (1) still applies. He contends also that the rules are ultra vires and illegal by reason of the fact that, not only is competition within a restricted area made impossible, which he contends is contrary to public policy; but in addition he argues that as under Rule 53 the society is bound to take a share in the Irish Agricultural Organisation Society, and to contribute certain affiliation fees thereto, the regulations and rules of the Irish Agricultural Organisation Society have to be considered in connexion with this question of ultra vires, and that when so considered this Coolmoynes

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Now, in the first place, I consider the position with regard to the local society alone. There is no absolute prohibition of the transfer of shares; but shares cannot be transferred without the approval of the committee. Such a provision is usual in the case of limited companies, and in a society such as this might, I think, reasonably be regarded as legitimate. I am not at liberty to assume that the committee would capriciously or dishonestly refuse to permit a transfer. If they did so, and it could be established, the shareholder would clearly have a remedy. I am not at liberty to regard it as a case where the powers might be used fraudulently or for an illegal purpose.

There is a passage—indeed there are two passages—in the judgment of Holmes L.J. in *Hanley's Case* (1) capable of being read in favour of the contention of the defendant. At page 600 he takes the case of a handloom weaver, who had no other means of livelihood, and who had contracted with a merchant in Leeds that he would sell to him the output of his loom during his whole life at a price to be fixed by the merchant, and he said, "Would any lawyer argue that such a contract was legal?" And at the previous page he speaks of "no limit of time by which the shareholder can free himself by independent action."

In general terms, the scheme of this creamery is this: that a limited number of farmers, within a limited area, bind themselves to one another that all will supply the milk to the company which they themselves have formed, and to no other manufacturing or competing company. In return the company bind themselves to purchase their milk; and although the price in one sense is not a price over which the member has ordinary control, he cannot be, as far as I can see, unfairly affected by it, because it is obviously

not in the interests of the shareholders, among whom, including the defendant, nearly all the profits will ultimately be distributed, to fix prices which would injure their own pockets.

So far as the contract between two individuals, or a number of individuals, is concerned, I take it that our law is pretty clear. Considered from the point of view of the parties themselves, as a general rule they are the best judges of what is best for themselves, and if they deliberately enter into a contract by which they mutually agree to furnish benefits inter se, they cannot be lightly allowed to depart from their contract. A man cannot take the benefit of the agreement in so far as it may be favourable to him, and repudiate it so far as it may be favourable to the other contracting party. He also is the best judge, and the sole judge, of the adequacy of the consideration. No doubt there may be cases where, on grounds of public policy, a man may succeed in getting out of a contract such as this, but they must be few. It is a different matter, so far, of course, as the public are concerned, and the agreement may be an illegal one, so illegal that it taints the contract even inter partes.

Now, in the present instance, and considering the case merely from the point of view of the creamery company, it really is very little more than an ordinary partnership, under the terms of which the members bind themselves to pool the farming produce which they severally control within a very restricted area, for their mutual benefit, and to prevent undue competition against the whole body.

On the whole, it seems to me to be very probably a most advantageous arrangement for those who join collectively. No doubt, an individual might, having entered into the agreement, find that he could make a larger profit by departing from it; but that is no ground for allowing him to do so. He has made his bargain, and, so long as it does not break a fundamental rule of law, it binds him.

The North-Western Salt Company, Ltd., v. Electrolytic Alkali Company, Limited (1), is a very important case on this branch of the dispute. There the plaintiff company was a combination of salt

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 1916. and keeping up prices, and it had practically control of the inland
 COOLMOYNE salt market. The members of the company were entitled to be
 Co- appointed as its distributors—that is, agents who sold on behalf
 OPERATIVE of the company the salt which it purchased from them. The
 CREAMERY defendants, who had not joined in the combination, agreed to sell
 o. to the company for four years a large quantity of salt, of which
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 Sir Ignatius J. per ton, and undertook not to make any other salt for sale. They
 O'Brien L.C. were to have the option of buying back the whole or part of their
 table salt in each year at the plaintiff company's current selling
 price, and were to be appointed distributors on the same terms as
 the company's other distributors. They sold salt in breach of this
 contract, and it was held that the agreement was not *ex facie*
 illegal. It was a contract far more potent in its effects, both
 with regard to individuals and with regard to the public, as to
 which I will say more later on, than the present.

At page 471, Haldane L.C. says:—"When the question is one of the validity of a commercial agreement for regulating their trade relations entered into between two firms or companies, the law adopts a somewhat different attitude—(that is to say, different from an agreement relating to service)—it still looks carefully to the interest of the public; but it regards the parties as the best judges of what is reasonable as between themselves. In the present case I see no reason for doubting that in entering into the contract on which this action was brought the respondents were probably acting in their own best interest. It may well be that such a contract was, in view of the powerful position of the appellants, the respondents' best way of securing a market and adequate prices. And if this be once conceded, I find nothing else in the detailed provisions of the contract excepting machinery for working out the bargain. If the general object was lawful, then these provisions were, in my opinion, free from objection on the score of illegality."

To my mind this passage, taking it for the moment from the restricted point of view of the small local organisation, accurately expresses the position; but there is, of course, the very substantial difference that, in fact, the man who enters into the contract may

be bound for life. Is this per se illegal? An ordinary contract between two, or twenty, or a hundred individuals binding themselves in merely commercial relations for the term of their lives would not, I conceive, be illegal. And this agreement must, I think, be considered solely from the commercial point of view, and not from the point of view of a different class of case altogether—namely, cases where restrictive covenants, after the period at which a servant was employed, have been held to be contrary to public policy, of which we find the latest and most interesting example in *Herbert Morris, Limited, v. Saxelby* (1). I admit that when this case was opened the result did seem to me somewhat startling, but I am now convinced that, regarding it from the point of view of our ordinary rules of law, to hold it void as a commercial agreement against public policy would be a wrong decision, and so far-reaching in its effects that it might seriously embarrass commercial undertakings in the success of which as a community we may be interested, and, as I conceive, it would be contrary to authority.

Again, quoting from the judgment of Haldane L.C., at page 473 of the *Alkali Case* (2), I find him citing the passage from the judgment of Lindley L.J., in the *Nordenfelt Case* (3)—“The interest of the public is no doubt adverse to monopolies and to restrictions on trade; but then its interest is to allow its members to carry on those businesses which they prefer, and to sell to the best advantage those businesses which for any reason they do not wish to continue.”

It is quite conceivable that the agreement which the plaintiffs have entered into in this case, so far from its producing a mere local monopoly, may really operate as a weapon against monopoly, because it enables a number of small and financially weak men, by banding themselves together, to resist successfully the competition of large and possibly wealthy corporations, whose object may be to control not only the local but the general market. So far as the public are concerned, it is, to my mind, and I say so after very careful deliberation, impossible to hold this particular agreement, owing to its tendency to create a monopoly, to be bad on the ground that it is contrary to public policy.

(1) [1916] A. C. 688. (2) [1914] A. C. 461. (3) [1893] 1 Ch. 630, at p. 646.

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With regard to the larger aspect of the case—namely, the control which to some extent the parent association, that is, the I. A. O. S., as it is called—may obtain over the milk and butter trade in general, I am of opinion that the principles laid down by Haldane L.C., and the other law lords in the case which I have cited, also dispose of that issue, in the present case, against the defendant. In that case it was argued that in certain circumstances the agreement *might* enable rules against public policy to be violated. I understand the case to have determined this: that the Court does not consider itself at liberty to speculate as to what may, under a possible condition of things, be the situation; that when it is a mere question of whether *ex facie* the contract is illegal as against public policy, they must find the illegality clearly on the face of the document, otherwise they cannot interfere. It may be possible that if the regulations of the local societies and the regulations of the parent society were dishonestly utilized for the purpose of creating an unfair monopoly with regard to the whole of Ireland, and to the detriment of the public, the law could effectively intervene; but unless this object appears on the face of the constitution of these bodies, in the absence of proof of actual illegality, we cannot assume possible illegality where it is at any rate equally open to us to assume legality with a due regard to the principle that fraud is not in the absence of evidence to be presumed.

The whole of this question of huge trade combinations, and how far the law will interfere with them, is practically a question more for the Legislature than for our Courts. Our law has been built up upon a condition of things in which a vast number of people are engaged, to use a popular expression, “in a small way of business,” and the rules regulating the relation of traders so engaged, applied to large trade organizations, may or may not be what the Legislature may consider wise to permit; but it is for the Legislature to interfere. Trade combinations on a huge scale are taking place all over the world, England and Ireland not excepted. In many respects they are to the public advantage. In others—I do not suggest this is one—possibly they cannot be so, as leading to the aggrandisement of individuals. But illegality cannot be presumed; it must be proved as a fact, and in this

present case we have nothing but the documents themselves; and I can see on the face of them nothing importing illegality based on the theory of the public concern.

I wish to say that I think in the argument of the case the appellant has failed sufficiently to observe the distinction between commercial contracts and contracts which in one sense restrict trade and other cases in which, after those who have entered into the contract have severed their partnership, some members of the former association, or possibly those who constitute the continuing association, endeavour for all time to restrict the commercial operations of those who have so severed their connexion. So long as the partnership exists, as between the members, the rule that they are the best judges of what is best for themselves seems to me necessarily to prevail, and the interest of the public does not arise, save, of course, in exceptional cases, of which I do not conceive this to be one.

If, after this man had ceased to be a member of the society, the regulations bound him to supply milk to the creamery and to no one else even in the district, then the case might be totally different. But no such restriction is imposed, and both the duties which he owes to his fellow-members and the duties which they owe to him, and which are reciprocal, continue for their mutual benefit, and there is no unreasonableness. I do not think the passage to which I have referred in the judgment of Holmes L.J., can have any application to the present case, and, so far as I can see, in any view it went too far.

Although a large number of authorities have been cited in the course of the argument, I have confined myself to practically two or three, but I have carefully weighed all the cases that were cited, and I do not think that any of them requires me to come to a conclusion different from what I have stated.

I am accordingly of opinion that the decision of the Court below should be affirmed.

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RONAN L.J. :—

In the case stated Mr. Justice Gibson remarks that Rule 67, as to disputes, was not relied on or even mentioned by either side. It will be observed that the same thing occurred in *Hanley's Case* (1). At first it occurred to us that a question might arise as to jurisdiction similar to that in the *M'Ellistrim Case* (2).

However, it appears to me clear that sect. 23 of the Industrial and Provident Societies Act of 1890 gave the county court full jurisdiction to try every question in this case.

In the first place, taking *Hanley's Case* (1) as absolutely binding, I see no reason to alter the opinion I expressed in the *Athlacca Co-operative Creamery v. Lynch* (3), as it has been now approved of by the King's Bench Division in this case and by my colleagues in the present appeal. This would be sufficient to dispose of the present appeal.

There is, however, one question in the case which I am glad I am not called on to decide. No. 9 in Schedule II to the Act of 1893, under the heading "Matters to be provided for by the rules of societies" reads:—"Determination *whether* and how members may withdraw from the society." Sect. 10 of the Act provides that the rules *shall* contain provisions in respect of the several matters mentioned in the second schedule. This is mandatory. It seems to me a very grave question whether "Determination *whether* a member may withdraw" does not, in case it is intended that a member may *not* withdraw, require that this should be specifically stated on the face of the rules, so as to give full notice of this most important fact. In *Hanley's Case* (1) the Lord Chief Baron and the Court of Appeal have held that this is not necessary, and I am bound by this decision.

However, having regard to the opening passage of the judgment of Pim J., and to some of the arguments addressed to us on behalf of the appellant, I wish to make a few remarks on that case. I have obtained a copy of the judgment (4) of the Lord Chief Baron in the *Hanley Case* (1). He puts the matter very plainly:—"I cannot think that, from the nature of the contract here, there is anything more in the nature of restraint of trade than

(1) [1912] 2 I. R. 586.

(3) 49 I. L. T. R. 233.

(2) [1917] 1 Ir. 93.

(4) Not reported.

there would be anything in the nature of restraint of trade in a contract that one man would contract to sell a particular substance that he would produce to another person," and he puts restraint of trade wholly out of the case.

The contract in *Hanley's Case* (1) was a contract by several persons to form an association to carry on jointly the business of makers and sellers of butter for their joint benefit, the profits to be divided amongst them.

In such a contract there may be two classes of provisions restricting the individual freedom of action of the parties:—*x* while members of the association; and *y* after they have ceased to be members.

Take the case of three farmers, A, B, and C, forming such an association. Is there anything illegal in their agreeing as to *x*, that they will not carry on the business individually, that each will sell all his milk to the association on terms fixed by the agreement? I should have thought not.

On the other hand, as to *y*, a contract that after one of them had ceased to be a member of the association he would not carry on the business or sell milk to anyone but the association at prices to be fixed by the association, would be a wholly different matter. Lord Justice Holmes says at page 600 of *Hanley's Case* (1):—"Let me suppose that in the days of hand-loom a weaver, who had no other means of livelihood, had contracted with a merchant in Leeds that he would sell to him the output of his loom during his whole life at a price to be fixed by the merchant, would any lawyer argue that such a contract was legal? It is because the contract arising from Rule 5*a* is of the same character that I hold it void." With great respect to the Lord Justice, he omits vital facts in applying his illustration to the present case. He should assume—1, that the merchant and the weaver were partners in the sale of cloth, and that the profits on the sale were divided between them; 2, that the price was not fixed by *one* member of the firm, but by the firm of which both were members, which firm and not an outsider was the purchaser. Would any lawyer argue that such a contract as I have stated was illegal, even if it were admitted that the contract, as stated by him, would be

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illegal? In truth, with great respect to him, it is absurd to talk of any sane business man agreeing to sell anything, leaving the fixing of the price entirely to the purchaser, when there is no connexion between them.

In my opinion, his statement that "it is because the contract arising from Rule 5*a* is of the same character that I hold it void," proves conclusively that in dealing with the case he entirely overlooked (*a*) the fact that Rule 5*a* was a term of a contract of association regulating the conduct of the members while members thereof; (*b*) that the profits were divided between the members, including the defendant; and (*c*) that the price was fixed by the members, of whom the defendant was one, or by persons appointed by them, to be chosen in manner agreed on by the defendant and the other members, and that the purchaser was not a third person, but the firm of which the defendant was a member. Lord Justice Holmes does not refer to any cases. The judgments of the Lord Chancellor and Lord Justice Cherry are based on authorities of class *y* above mentioned, which in my opinion have no application to cases of class *x*, to which *Hanley's Case* (1) belongs. The principles applicable to the two classes are widely different.

Hanley's Case (1) was a case of *x*. The distinction was taken in the argument, but the authorities cited were all cases of contracts to take effect after the connexion between the parties had ceased. The authorities cited on the subject were—(*a*) cases where A sells his business to B, and agrees not to carry on the same business himself in future; (*b*) cases of master and servant, where the servant agrees not to carry on the same business after he has left the employment; (*c*) partnership where a member agrees that, after he has ceased to be a partner, he will not carry on the same business. The essential element is the same in all three. The man sought to be prohibited from carrying on the business is not a person carrying it on jointly with the others, either as servant or partner. He is an individual having no share or interest in the old business.

Those authorities were apparently applied by the Court as if there was no distinction between the classes *x* and *y*. I called attention to the distinction early in the argument, and asked

(1) [1912] 2 I. R. 586.

counsel if he could refer to any case, except *Hanley's Case* (1), where this doctrine was applied pending the relation of master and servant or that of partnership. Finally, it was admitted that *Hanley's Case* (1) was the only case that could be found. It stands alone. The partnership cases are the nearest analogy to the present. I agree with Pim J. that the rules of a society such as this are similar in principle to the articles of association under the Companies Acts. Sect. 54 of the Act of 1893 enables such a society to convert itself by a simple process into a company under the Companies Acts, and sect. 55 enables a company to convert itself into a registered society under the Act. This shows that the essential nature of the objects of the formation of such an association can be carried out either under the Companies Acts or under the Act of 1893. Even without being converted into a company the society can be wound up under the Companies Act, 1908: see Buckley's Companies Act, 1908, ninth edition, p. 312.

It has been often said that companies are of the nature of partnerships. I quote as an instance a short statement by one of the two greatest living authorities on the subject. In *Newton v. Birmingham Small Arms Company, Limited* (2), Buckley L.J., at p. 386, says:—"The Companies Act, 1862, was silent as to accounts. Table A (which the company might or might not adopt as it chose) contained provisions on the subject, but otherwise the Act left the matter untouched, relying, no doubt, upon the application of the ordinary principles applicable as between partners, and proceeding upon the footing that *the members of a company under the Act are partners in a special sort of partnership, modified and governed by statutory provisions.*"

In my opinion the words in italics describe accurately the position of the members of the society in the present case. A special section was thought necessary—sect. 1, sub-s. 2, of the Partnership Act, 1890—to exclude companies under the Companies Acts and other statutory associations, such as this society, from that Act. At the same time, there is no doubt that they are not (until converted) joint stock companies, still less common-

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(2) [1906] 2 Ch. 378.

Appeal. law partnerships. As Lord Macnaghten says in *Auld v. Glasgow*
 1916. *Working Men's Building Society* (1), at p. 205, "the rules form
 COO: MOYNE the contract between the members and the society, and that
 Co- contract can only be altered in the mode provided by the Act of
 OPERATIVE Parliament."
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BULFIN. In Lindley on Partnership, 8th edition, pp. 503-6, there is a
 Ronan L.J. full discussion of restraint of trade in relation to a contract by a
 partner not to carry on the same business as the firm after he has
 left it; but there is not a suggestion that any such doctrine
 applies to restrictions while he continues a member. On the con-
 trary, in the absence of any provision on the matter, the common
 law provided that he should not secretly or openly carry on any
 business competing with that of the firm of which he is a member;
 and this principle is embodied in sect. 30 of the Partnership Act.
 Nay, further, an express provision that while he is a member he
 shall not carry on any *other* business, is binding, and can be
 enforced: Lindley on Partnership, 8th edition, p. 482. This
 means really that he is to carry on no business but the business
 of the firm of which he is a member.

The true principle is that stated by Lord Parker in *Attorney-
 General of the Commonwealth of Australia v. Adelaide Steamship
 Co., Limited* (2). He says: "It is only necessary to add that no
 contract was ever an offence at common law merely because it was
 in restraint of trade. The parties to such a contract, even if
 unenforceable, were always at liberty to act on it in the manner
 agreed. Similarly combinations, not amounting to contracts, in
 restraint of trade were never unlawful at common law. To make
 any such contract or combination unlawful it must amount to a
 criminal conspiracy, and the essence of a criminal conspiracy is a
 contract or combination to do something unlawful, or something
 lawful by unlawful means. The right of the individual to carry
 on his trade or business in the manner he considers best in his
 own interests involves the right of combining with others in a
 common course of action, provided such common course of action
 is undertaken with a single view to the interests of the combining
 parties, and not with a view to injure others."

(1) 12 A. C. 197.

(2) [1913] A. C. 781, at p. 797.

This should be read with the statement by Lord Haldane in *North-Western Salt Co. v. Electrolytic Alkali Co.* (1), namely, that when the controversy was as to the validity of an agreement, say for service, by which someone who had little opportunity of choice had precluded himself from earning his living by the exercise of his calling *after the period of service was over*, the law looked jealously at the bargain; but that when the question was one of the validity of a commercial agreement for regulating their trade relations, entered into between two firms or companies, "the law adopts a somewhat different attitude—it still looks carefully to the interests of the public, but it regards the parties as the best judges of what is reasonable as between themselves."

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This latter passage clearly points the distinction between the contract after the period of service is terminated and during the existence of the service or partnership.

What is said of firms or companies is equally true of individuals. In the latter case, "the law regards the parties as the best judges of what is reasonable as between themselves."

Taking Lord Parker's statement and Lord Haldane's statement together they appear to me to amount to this: partners are free to enter into combination to carry on a trade or business for their own interest together, provided it is not with a view to injure others; and the law regards them as the best judges of what is reasonable as between themselves. This accounts for the fact that, with the one exception of *Hanley's Case* (2), no case can be found either of a partnership or company in which any restriction of the liberty of a member, while a member, has been held to be an unlawful restraint of trade.

Lord Haldane refers to the interest of the public. All the Lords accepted the judgment of Lord Parker in the *Adelaide Case* (3) as to this. It is obvious that the stipulation in these rules of this little society could not possibly produce "a pernicious monopoly" calculated to enhance prices to a considerable extent. The Lord Chancellor thought it might be possible for the appellant to show that this society was part of an entire scheme which was

(1) [1914] A. C. 461, at p. 471.

(3) [1913] A. C. 781.

(2) [1912] 2 I. R. 586.

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calculated to have this effect all over the country, but he wholly failed to do so.

The principle of the common law carried out by the Partnership Act does not apply to companies. Modern companies have so many shareholders who have no connexion with the business of the company that it would be inconvenient to apply it. At the same time it must be remembered that there is at common law no limit to the number of partners or to the duration of partnership.

The articles of association in the case of a company, and the rules in such a case as this, really are the partnership deed. Save where some statute intervenes, I see nothing to prevent the introduction into articles of association or rules of any provision that would be lawful in a partnership deed. It is not found generally convenient to have clauses restricting the liberty of the members in cases of large companies.

The law in this respect is the same in large and small companies. Mr. Palmer in his "Company Precedents," eleventh edition, part I., p. 977, gives as "very common" provisions, two forms headed "Restrictions on Members." These two forms illustrate very clearly the distinction to which I have drawn attention. The earlier form, imposing restraint only so long as membership continues, is absolutely unlimited in space and time, and is as follows:—"A member of the company shall not, either solely or jointly with, or as manager or agent for, any other person, directly or indirectly carry on or be engaged or concerned or interested as a shareholder or otherwise in any business which the company is authorized to carry on, and the directors may by resolution forfeit the shares of any member who acts in contravention of this provision, and Clause 30 shall apply." The latter form, which imposes restraint to continue after membership has ceased, is carefully limited as to time and space, so as not to offend against the law in this respect. It reads:—"A person who ceases to be a member of the company shall not at any time within five years, to be computed from the time when he so ceases to be a member, either solely, etc., in the business of a ——— within 100 miles of the City of ———." I may add, that though he deals fully with restraint of trade, Mr. Palmer never suggests that the

principle has any application to the case of a member while a member of the company. If these clauses are valid in articles of association, I can see no reason why they should not be valid in rules such as these. The stipulations as to shares and transfer are simply those found in the articles of association of "ordinary" companies. The society can be wound up under the Companies Acts. The committee are practically in the same position as the directors of a company, and are elected by the members.

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This is an association for dividing the profits amongst the members. The clause as to profits is not even referred to in the judgments in *Hanley's Case* (1).

Having regard to the judgments in the two subsequent cases (in the House of Lords and Privy Council) to which I have referred, I do not think that *Hanley's Case* (1) can now be regarded as a binding authority, so far as it applies the doctrine of restraint of trade to stipulations affecting the conduct of members of trading associations while they are members.

MOLONY L.J. —

It appears that the defendant is a member of the Coolmoyné and Fethard Co-operative Dairy Society, Limited, and that the creamery company obtained a decree against him in the county Court for £20 damages for not supplying milk to the plaintiff society as provided by the rules of the society. The rules in question were adopted at a meeting held on the 11th May, 1914, and which rules were duly registered on the 29th June, 1914, and provided that the society shall consist of persons resident in or occupying or grazing lands in certain specified townlands in the county of Tipperary, and that after the society shall have started a creamery for its members no individual member of the society, so long as he continues a member thereof, who shall have milk to sell, the produce of a cow or cows-kept or grazed on lands within the specified area, shall, without the written consent of the committee first obtained, sell any such milk to any creamery other than a creamery of the society, or to any company, society, person, or persons who sell milk or manufacture butter for sale.

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It is further provided by the said rule that any member of the society committing a breach of the rule shall pay to the society, as and for liquidated damages, and not by way of penalty, the sum of one shilling per cow per day for every cow's milk sold contrary to the rule. The rules further provide that the transfer of ordinary shares can only be made with the consent of the committee.

The plaintiffs took proceedings in the county court under the provisions of sect. 23, sub-s. 1, of the Act of 1893, which provides that all money payable by a member of a registered society shall be a debt due from such member to the society and shall be recoverable in the county court.

The defendant contends that the absence of a time limit, and the area of prohibition, make the rules unreasonable and injurious to the interests of the public; but the plaintiffs, on the other hand, say that the power of assignment, with the consent of the plaintiffs, removed any objection founded on the absence of a time limit, and that in any event a time limit is not essential to the validity of the rule. There is no doubt that the alterations in the rules of 1914 were made in consequence of the decision in the *Tipperary Creamery Society v. Hanley* (1), as the rules previously in force were identical with the rule which came up for discussion in that case. The new rules were duly registered on the 29th June, 1914. The defendant got an allotment of shares on the 25th August, 1914, and he then for the first time became a member of the society and subject to the rules. It is not necessary to refer to the matters which were objected to in *Hanley's Case* (1) further than to say that all the objections have been removed by the new rules of the plaintiff society, except that the rules do not contain any time limit, and the only question which seems to me to be open for discussion in the present case is as to whether the time limit is essential to the validity of the rules? There are, however, many cases which show that if a restraint is in other respects reasonable, the absence of a time limit will not make it void. I do not think it necessary to go through these cases, some of which have been discussed by my

(1) [1912] 2 I. R. 586.

colleagues, and I agree in their conclusion that the rules of the plaintiff society are, in the circumstances of the present case, valid and binding on the defendant.

Solicitor for the appellant: *G. A. Nolan.*

Solicitor for the respondent: *C. M. Barry.*

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BURNS *v.* JOHNSTON.

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1916.

False Imprisonment—Workman in Factory—Hours of Employment—Quitting Work before end of day—Gate of Factory locked—Refusal of Employer to give Facilities for leaving Factory—Volenti non fit injuria.

Dec. 4, 5

The plaintiff appealed to the Court of Appeal against the decision of the Divisional Court, reported *ante*, at [1916] 2 I. R., p. 444.

Chambers K.C. and *M. Maguire*, for the appellant.

S. L. Brown K.C., *D. M. Wilson K.C.*, and *T. Brown*, for the respondents.

The arguments and cases cited were the same as in the Court below.

The Court of Appeal (*SIR IGNATIUS J. O'BRIEN C.*, *RONAN* and *MOLONY L.JJ.*) dismissed the appeal.

Solicitor for the appellant: *A. Campbell.*

Solicitor for the respondents: *T. G. Menary.*

A. E. C.

PORTER v. KIRTLAN.

(1914. No. 11037.)

K. B. Div.

1915.

Nov. 18, 23.

Dec. 14.

1916.

Jan. 13.

Appeal.

1916.

June 6, 7, 14.

Solicitor—Bill of Costs—Retainer—Irish Solicitor undertaking Professional work in Ireland for English Solicitor—Liability for Costs—Custom.

The personal liability of an English solicitor, at whose instance an Irish solicitor undertakes professional work in Ireland for an English client, depends in each case upon whether there is a contract express or implied that the Irish solicitor shall be entitled to recover his costs from the English solicitor.

K., an English solicitor, on behalf of an English client, instructed P., an Irish solicitor, to take proceedings in the King's Bench Division in Ireland against T. S. of Dublin. At the trial of the action, without a jury, Dodd J. held a custom to be proved, that where an English solicitor instructs an Irish solicitor to take proceedings in an Irish court, the latter, in the absence of an express agreement contravening the custom, was entitled to recover from the instructing solicitor the entire outlay and two-thirds of the charges for professional services reasonably and properly incurred, and entered a verdict and judgment in favour of the plaintiffs accordingly.

Held, by the Court of Appeal (Sir I. J. O'Brien C., Ronan L.J., Molony L.J. *diss.*) (reversing the decision of the King's Bench Division (Cherry L.C.J., Madden and Boyd JJ.), namely, that the plaintiff was estopped from alleging that the defendant was his client, and that the custom found by Dodd J. would be illegal and repugnant to the ordinary rules governing the relations between solicitor and client), that an express contract by the defendant to pay the plaintiff was established by the correspondence. *Held* also, that there is nothing inherently illegal in a contract by an English solicitor to pay for professional work carried out in Ireland by an Irish solicitor for an English client, and that a bill of costs for such work is taxable.

NEW TRIAL MOTION.

This was an action by an Irish solicitor against an English solicitor for work done and professional services rendered by the plaintiff. The defence was that the client, and not the defendant, was liable for the costs.

The plaintiff, who practises as a solicitor in Belfast, was, as he alleged, instructed and retained by the defendant, a practising solicitor at Eastbourne, to bring an action in the Irish King's

Bench Division at the suit of *Kyl Fyre, Ltd.*, an English firm, *K. B. Div.*
 and clients of the defendant, against one Thomas Scott, of 1915.
 Dublin. Proceedings were accordingly instituted by the plaintiff, *PORTER*
 and the result was a verdict for *Kyl Fyre, Ltd.*, on some of the *v.*
 counts, and for the defendant, Thomas Scott, on other counts. *KIRTLAN.*
 The costs were apportioned as follows:—One-fourth to *Kyl Fyre,*
Ltd., and three-fourths to Thomas Scott.

In due course Mr. Porter furnished the defendant with a bill of costs, claiming a balance of £102 15s. 8d., due to him from the English solicitor in respect of the action of *Kyl Fyre, Ltd., v. Scott.* He allowed credit for a sum of £20, paid during the progress of the action. This payment was made by a cheque of *Kyl Fyre, Ltd.* The defendant, in his defence, traversed the cause of action, and pleaded that the costs sued for were incurred in the action of *Kyl Fyre, Ltd., v. Scott*, “in which the plaintiff acted as solicitor for the plaintiffs therein. The defendant, who was acting as English solicitor for the said *Kyl Fyre, Ltd.*, referred them, the said *Kyl Fyre, Ltd.*, to the plaintiff in this action, who was, and is, an Irish solicitor, for the purpose of the said plaintiff acting for them in the said action. The plaintiff herein undertook to act as solicitor in this country in connexion with the said action for the said *Kyl Fyre, Ltd.*, and any costs incurred by him in the aforesaid action were so incurred on behalf of, and as solicitor for, the said *Kyl Fyre, Ltd.*, and the defendant herein will submit that he incurred no liability in respect thereof to the plaintiff in this action.” The defendant further pleaded “that in employing the plaintiff as solicitor in the matters covered by the said bill of costs he was acting, not on his own account, but only as agent for the said *Kyl Fyre, Ltd.*, as the plaintiff, at the time of the employment, well knew.”

The plaintiff, in a reply, pleaded that the defendant was estopped from setting up the foregoing defence, and the grounds of estoppel alleged were as follows:—“After the said costs were incurred, *Kyl Fyre, Ltd.*, were in financial difficulties, and were making an arrangement with their creditors. The defendant informed the plaintiff of the fact that *Kyl Fyre, Ltd.*, were in financial difficulties, and were making an arrangement with their creditors. The defendant did so for the purpose of inducing the

K. B. Div. plaintiff to give the defendant further time to pay the costs in
1915. respect of which this action is brought. The plaintiff gave the
PORTER defendant further time to pay, but informed the defendant that
v. he (the plaintiff) was not concerned with Kyl Fyre, Ltd., as he
KIRTLAN. was holding the defendant responsible to him for the costs in
respect of which this action is brought. The defendant not only did
not repudiate his liability to the plaintiff to pay him the said costs,
but admitted his liability to pay them, and informed the plaintiff
that he (the defendant) was proving in the said arrangement as a
creditor of Kyl Fyre, Ltd., in respect of the said costs; and the
defendant did in fact prove in the said arrangement as such
creditor in respect of the said costs, and obtained, or was declared
entitled to, a dividend in respect thereof."

The case was tried before Dodd J. without a jury, on the
14th May, 1915.

The facts as stated in the judgment of Cherry L.C.J. are
shortly as follows:—

On the 2nd September, 1910, the defendant Kirtlan, who is a
solicitor practising in England, wrote to the plaintiff Porter a
letter, in which, after setting out the facts in dispute between his
client Kyl Fyre, Ltd., and Scott, he goes on to say:—"I enclose
copy of correspondence, and shall be obliged if you will kindly
commence proceedings in the Superior Court claiming £50
damages for trespass. I think you have all the necessary informa-
tion, but, if not, please let me know what more you require."
Plaintiff replied by a letter of the 3rd September, 1910, stating
that he was having proceedings taken, and that he thought the
information given him was sufficient. There was no reference in
either letter to the payment of costs, but shortly afterwards
plaintiff issued a writ in the suit of Kyl Fyre, Ltd., and Scott, in
which he described himself as solicitor for the plaintiff company;
and he acted throughout the entire proceedings, which were pro-
tracted, as such. The only payment, up to the present, made on
foot of costs was a sum of £20, for which credit is given in the
writ. This payment, it is important to observe, was made by a
cheque of Kyl Fyre, Ltd., to plaintiff, which was sent on the
13th June, 1911, by the defendant to the plaintiff in response to a

request by the plaintiff for some money on account of costs. *K. B. Div.*
Kyl Fyre, Ltd., have since gone into liquidation. 1915.

DODD J. found that a custom was proved that where an English solicitor, on behalf of an English client, instructed an Irish solicitor to take proceedings in an Irish Court, or to act professionally for him in any matter, or conversely, where an Irish solicitor instructed an English solicitor to take proceedings for an Irish client in an English Court, or to act professionally for him in any matter, there being no express agreement contravening the custom, the solicitor who acted upon the instructions was entitled to recover from the solicitor who gave the instructions the entire sums reasonably and properly spent on outlay, and two-thirds of the sum reasonably and properly incurred for professional services. A verdict and judgment were entered in favour of the plaintiff. The defendant moved that this verdict and judgment be set aside, and that judgment be entered for him, or alternatively for a new trial.

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Gibson K.C. and *Swayne*, for the defendant.

Best K.C. and *Bartley*, for the plaintiff.

The arguments were similar to those in the Court of Appeal.

CHERRY L.C.J. :—

1916.
 Jan. 13.

The Lord Chief Justice having stated the facts as set out above, proceeded :—

This is an action brought to recover a sum of £102 15s. 8d., balance of a sum of £120 15s. 8d., alleged to be due by the defendant to the plaintiff as solicitor's costs. The endorsement upon the writ claims that sum as due "for professional services rendered and money expended by the plaintiff as a solicitor in and about the business of the defendant and at his request." The particulars furnished consist of a bill of costs in a suit of *Kyl Fyre, Ltd.*, v. *Thomas Scott*, in which the plaintiff in the present action acted as solicitor for the plaintiff company. The costs were ordinary party and party costs, claimed by a solicitor from his client; but the alleged client in this case was not a party to the action of *Kyl Fyre v. Scott* at all, and it seems difficult to see how he can be personally liable for the costs.

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Cherry

L.C.J.

The plaintiff claims that the costs incurred on behalf of the insolvent company are really due to him by the defendant, the English solicitor, who introduced *Kyl Fyre, Ltd.*, to him. He bases his claim upon an alleged custom in the solicitors' profession: that an Irish solicitor employed by an English solicitor to conduct litigation on behalf of an English client looks to the English solicitor only for payment, and not to the client; and that he is bound to allow to the English solicitor, by way of commission, one-third of the profit costs, receiving for himself from the English solicitor all his out-of-pocket expenses and two-thirds of his profit costs. A similar custom would, of course, apply in the converse case of an English solicitor being employed by an Irish solicitor on behalf of an Irish client.

Evidence of such a custom was given by three very eminent solicitors in Dublin, two of them former presidents of the Incorporated Law Society. Their evidence, however, was somewhat vague. "The custom is," says Sir John Lynch, "you never look to the client, you look to the solicitor." Mr. Hayes, Mr. White, and the plaintiff himself gave similar evidence. This does not necessarily mean that the English solicitor is personally liable to pay. It may only mean that it is his duty to obtain the money from his client, and transmit it to the Irish solicitor, deducting the amount of his commission, i.e. one-third of the profit costs. This is the construction I should be inclined to place upon the evidence, as reported in the learned judge's note. It is supported by the very fact of a commission being paid. The receipt of a commission by the English solicitor seems to me to indicate that he is an agent and not the principal in the matter. The learned judge has accepted the evidence of the custom given by the three solicitors who were examined on behalf of the plaintiff, as establishing that the English solicitor is personally liable for the costs; that he is in the position of client as regards the Irish solicitor, and that there is no privity of contract whatsoever between the Irish solicitor and the English client. Accordingly, he has given judgment for the amount claimed, less by the amount of the commission, which he holds to be payable under the custom. The startling result of this judgment is that the directors of *Kyl Fyre, Ltd.*, or any plaintiffs in a similar position,

will have no control whatsoever over the proceedings taken in their names. If Porter was not solicitor for the Kyl Fyre Company at all, but for Kirtlan only, as the learned judge has decided, he was not bound to obey the company's orders as to the conduct of the suit. He was bound to take his directions from Kirtlan alone; even if these directions were contrary to those given to him by the company.

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I do not think that any custom could legally exist which would deprive a party to an action of all control over the solicitor who, with his sanction, appears on the record for him. To interpose a third party not even named, or referred to, in the record as the real client would, in my opinion, be repugnant to the ordinary rules governing the relation between solicitor and client. —

In actions of contract, evidence of custom or usage is valuable where there is any doubt or uncertainty as to the legal relation of the parties; but where the parties themselves have shown by their acts and words what they intended that their mutual position should be, evidence of custom cannot I think be relied upon to show that a different legal relation existed between them.

In my opinion, therefore, the plaintiff in this suit, having issued the writ in the action of *Kyl Fyre v. Scott*, describing himself as solicitor for the plaintiff in that action, and having received payment on account of his costs by a cheque for £20, drawn by the Kyl Fyre Company, whom, by his own action, he described as his client, cannot now be allowed to set up a case that his real client was not the Kyl Fyre Company at all, but Kirtlan. If this be so, the present action must fail, as he cannot claim payment from both.

This view of the case is strongly supported by the decision of this Court, afterwards affirmed by the Court of Appeal, in the case of *Sinton v. Albin* (1). There it was held that an Irish solicitor retained, under circumstances similar to those in the present case, by a Scotch solicitor on behalf of a Scotch client could bind the Scotch client by an admission within the Statute of Limitations, upon the ground that the Irish solicitor directly represented the Scotch client. I can see no distinction, in principle, between that decision and the present case.

(1) 38 I. L. T. R. 109.

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L.C.J.

Mr. Best, in his able argument for the plaintiff in this case, relied very strongly upon the case of *Scrace v. Whittington* (1), and seemed to regard it as a conclusive authority in his favour. I do not so regard it. What was really decided in that case was, that when one solicitor was employed by another solicitor to do work on behalf of a client of the latter, it was a question of fact properly left to the jury to decide whether the first solicitor was acting on behalf of the other solicitor, or directly on behalf of the client; and that where (in circumstances quite different from those in the present case) the jury found that he was the agent of the other solicitor, and not of the latter's client, this verdict would not be disturbed by the Court. *Scrace v. Whittington* (1) was the strongest case cited in the plaintiff's favour in the argument before us, and it does not at all bear out the construction placed upon it. None of the other cases relied upon by plaintiff's counsel is in the slightest degree inconsistent with the view I take of the law in the present case.

In my opinion, the facts in the present case and the correspondence conclusively show that the plaintiff was acting throughout the action of *Kyl Fyre v. Scott* directly as solicitor for the Kyl Fyre Company, and that he can only recover his costs from them. The verdict and judgment in his favour shall, therefore, be set aside, and judgment entered for the defendant with costs.

MADDEN and BØYD JJ. concurred.

June 6, 7, 14.

The plaintiff appealed to the Court of Appeal.

Best K.C. and *Bartley* for the appellant:—

Scrace v. Whittington (1) is an express authority for the proposition that the question for decision is to whom was the credit given. It is quite clear from the correspondence that the Irish solicitor gave credit to the English solicitor, and not to the English client, and when the Irish solicitor wrote to the English solicitor stating he looked to him for payment, the English solicitor did not repudiate liability.

They also referred to *Deering v. Hyndman* (2) and *Sinton v. Albin* (3).

(1) 2 B. & C. 11. (2) 18 L. R. Ir. 323, 467. (3) 38 I. L. T. R. 109.

W. G. Gibson K.C. and *Swayne*, for defendant (instructed by *Appeal.*
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The letters between the plaintiff and defendant afford evidence of a retainer of the plaintiff by *Kyl Fyre, Ltd.* We submit that there was not sufficient proof of the custom found by *Dodd J.* The evidence given by the witnesses is ambiguous, and no English practitioner was called in support of the alleged custom. The custom found by the learned judge involves the application of the ordinary rules of principal and agent, so that, in this case, if the plaintiff had been guilty of negligence, he would have been liable to the defendant, and not to *Kyl Fyre, Ltd.*: *In re Farman* (1). A town agent owes no direct duty to the lay client: *Hannaford v. Syms* (2); see also *Re Pomeroy & Tanner* (3), *per Stirling J.*, at p. 287. It is submitted that the relation between an English solicitor and an Irish solicitor is not analogous to that between a town agent and his country correspondent: *Sinton v. Albin* (4), and that the custom found by *Dodd J.*, even if there was sufficient evidence of it, cannot be supported. Such custom, in the first place, is inconsistent with the written retainer, because it excludes the liability of the disclosed principal, *Kyl Fyre, Ltd.*: *Trueman v. Loder* (5). Secondly, it is illegal. It enables an unqualified person to practise as a solicitor through a qualified agent, and to take a share of the profits (ss. 6, 51, and 52, Solicitors Act, 1898 (61 & 62 Vict. c. 17)). The sharing of profits raises another serious question, having regard to the Prevention of Corruption Act (6 Edw. 7, c. 34). Thirdly, it is unreasonable. It deprives the lay client of the ordinary rights of a client in regard to the solicitor appearing for him on the record. The argument for the plaintiff goes the length of saying that if the plaintiff had received inconsistent directions from the defendant and *Kyl Fyre, Ltd.*, he would have been obliged to follow those of the defendant, notwithstanding that his name appears on the record as the solicitor of *Kyl Fyre, Ltd.*

How could the costs of the action be taxed as between the English and the Irish solicitors? The certificate of taxation,

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(1) 14 T. L. R. 20.

(2) 79 L. T. 30.

(3) [1897] 1 Ch. 284.

(4) 38 I. L. T. R. 109.

(5) 11 Ad & E. 589.

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 1916. due by the plaintiff or defendant on the record. As to solicitor
 PORTER and client costs, the client on the record alone can sign a requisition to tax.
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[*Wray v. Kemp* (1) was also referred to.]

SIR IGNATIUS O'BRIEN C. :—

The plaintiff in this case, Mr. Robert Porter, an Irish solicitor, has brought an action against Mr. Kirtlan, who is an English solicitor, to recover a sum of £102 15s. 8d. for work and labour done, and for moneys expended at the request of the defendant. It is an action based on an alleged contract between the plaintiff and the defendant, by which the defendant employed the plaintiff to do work, and which rendered it necessary for him also to expend certain moneys. The matter, so far as it is an action for work and labour done, and for moneys expended, is, of course, slightly complicated by reason of the fact that the claim is made by the plaintiff as a solicitor, which entails the submission of his claim, under the general law, to a process of adjustment by taxation; and it is also complicated—though I think the complication is more apparent than real—by the circumstances in which the contract was entered into. Mr. Kirtlan appears to have acted generally as solicitor for a firm called Kyl Fyre, Ltd. Kyl Fyre, Ltd., had a dispute in connexion with certain premises in the city of Dublin, and it became necessary for Mr. Kirtlan, acting presumably on instructions given to him by Kyl Fyre, Ltd., to assert their position with respect to those premises in proceedings which had of necessity to be taken within the jurisdiction of the Irish Courts. Mr. Kirtlan could not, of course, himself undertake the conduct or defence of any action within the jurisdiction of the Irish Courts, and, accordingly, the aid of an Irish solicitor, Mr. Porter, had to be invoked in this case. In the proceedings which were carried on in this country, Mr. Porter's name appeared in the ordinary way on the record as solicitor acting for Kyl Fyre, Ltd. It could appear in no other way, so far as the face of the record was concerned; and so far as the conduct of the proceedings was

concerned it was in the hands of Mr. Porter; and he was the person solely responsible to the Irish Courts in his position as solicitor on the record. The difficulty in the case, however, arises from this: that while Mr. Porter alleges that the contract made with him was one under which he was employed by Mr. Kirtlan, the latter now asserts that there never was a contract made with him, but only a contract by which Mr. Porter was employed by Kyl Fyre, Ltd., Mr. Kirtlan acting only as an agent, either as an agent for introduction, or an agent for the purpose of making a contract between Kyl Fyre, Ltd., and Mr. Porter.

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Now, the question to be determined is not one arising from custom, because you cannot base an action on custom solely. The first question to be determined is—was there a contract at all between Porter and Kirtlan, and, secondly, was there a contract between Porter and Kyl Fyre, Ltd.,—that, however, is only incidental to whether there was a contract between Porter and Kirtlan.

The third question is, if there was a contract, what were its terms? Custom has been introduced as an element into this action, but in the view which I take, custom does not affect the contract, which is to be found in the documents which passed between the plaintiff and the defendant.

Assuming for the moment—and I think it is the first case in which the contrary view has been asserted—that one solicitor can employ another to do work for him in respect of a person who is a client of the first-named solicitor, I am clearly of opinion that Kirtlan employed Porter. No doubt, custom can do a great many things in explaining and modifying contracts, but for the first time in my experience I have heard it argued that if there is a clear contract by *A* to employ *B*, custom can negative the existence of that contract, and create a contract between *A* and *C*, between whom there never was, as far as I can see, any contractual relation whatever.

Now, the whole question—apart from the important matters discussed as to the legality of the contract—so far as it is based on the existence of a contract between the plaintiff and the defendant, is contained in a series of letters which leave no doubt on my mind as to the true relation of the parties.

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[His Lordship read a voluminous correspondence between the plaintiff and defendant, and held that the defendant had employed the plaintiff to do the work in question, and proceeded]—

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I cannot find from the beginning of the correspondence to the issue of the writ any repudiation by Kirtlan of the claim of Mr. Porter that he was employed by him to do the work, and was entitled to be paid for it. I have to apologize for discussing the correspondence at such length, but I do so out of respect for the Judges of the King's Bench Division, with whose judgments I am unable to agree. On that correspondence I cannot see how any jury, or any Judge, could hold that Kyl Fyre, Ltd., employed Porter, or that Kirtlan did not employ him, and if this were an ordinary case not complicated by the relationship of solicitor and client, I think there could be no doubt whatever. But an attempt has been made to involve the case in supposed difficulties, which, to my mind, do not really exist; but as they have been the basis of the judgments of the King's Bench Division, I have to deal with them.

The first question which has been raised is this: It is said that Porter could only recover by introducing into the contract between him and Kirtlan some custom by which Porter was to look to Kirtlan and not to Kyl Fyre, Ltd. I may be wrong, but I think Porter has taken too large a burden on himself in this case. Apart from the question of the legality of the contract, the introduction of this custom is in ease of Kirtlan. If there was a custom proved at all—always assuming that Kirtlan employed Porter—it was a custom by which Porter could not demand the whole of his profit-costs, but only a part of them. That is the position Porter has taken up. It is said, however that may be, that Kirtlan was an agent for a disclosed principal, and, therefore, the only person to whom Porter can look is that principal. The general proposition of law with regard to an agent entering into a contract on behalf of a disclosed principal is perfectly clear. But there is nothing to prevent a man being an agent in one sense, and employing another person on terms that he was to get a share of the profits, and that the person employed was to look to the agent as personally liable to him.

That position of affairs was considered in an early case cited in argument—the case of *Scrace v. Whittington* (1)—which for what it decides is as good law now as in 1823. It has never been questioned. The marginal note is as follows:—"The attorney to a commission of bankrupt applied to the attorney of a mortgagee of premises belonging to the bankrupt to join in the sale of the mortgaged premises. The mortgagee having consented, her attorney requested the bankrupt's attorney to prepare, on the part of the mortgagee, requisitions to the commissioners of bankrupt to ascertain the amount of principal and interest due upon the mortgage, &c. The latter did so. The sale did not afterwards take effect. In an action brought by the bankrupt's attorney against the mortgagee's attorney for the amount due for the business done, it was held that the question was properly submitted to the jury, whether the credit was given to the defendant; and the jury having found that it was, that the attorney was liable, although at the time when the business was done it was known to be done for the benefit of the mortgagee."

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That case has been referred to as an authority with reference to the usage. The only purpose to which I apply it is to show that an attorney may employ another to do work which was part of general work which had to be done by the first employed attorney; that such a contract was in 1823 a valid contract; and that the question was one of fact to be submitted to a jury. That case was not complicated by any question arising from the relationship subsisting between a London and country solicitor. The attorneys were both country attorneys, and the Court there held that:—"The question was properly left to the jury. It is a common practice for one attorney to do business for another. The attorney for whom the business is done generally makes the other some allowance out of the profits. The attorney who does the business universally gives credit to the attorney who employs him, and not to the client for whose benefit it is done. An attorney doing business for another attorney may therefore give credit to that person to whom it is given in the usual course of business, viz., to the attorney and not to the client. Here the jury have found that the credit was given

(1) 2 B. & C. 11.

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to the defendant, and the law therefore will, from the usage of the business, raise an implied contract on the part of the other to pay. If an attorney in such a case intends not to be personally responsible, it becomes his duty to give express notice that the business is to be done upon the credit of the client." That case lays down the simple proposition that one attorney may enter into a contract with another attorney; and if he does the work, the other attorney must pay for it.

The next difficulty which is supposed to exist in the case is that because one of the solicitors happens to be out of the jurisdiction, and cannot practise within it, he cannot therefore enter into a contract with another solicitor in Ireland to employ him, and to pay him. I should have thought that this was an *à fortiori* case, because the solicitor out of the jurisdiction not being able to practise himself is compelled to employ another. Here, again, I have to differ from the Lord Chief Justice on the ground of general policy. He considers that to permit such an arrangement as was contended for by the plaintiff here would be highly improper in the eye of the law, and he relied on two authorities in support of that proposition. I should have thought that instead of it being an improper thing to do, it is a most natural and proper thing for a solicitor out of the jurisdiction to employ a solicitor within the jurisdiction to do the work for him. In order that there should be no doubt, I have made careful inquiries through the Taxing Officers in this country in the converse case for cases in which there have been such contracts, and I find that several such cases have arisen. I am not speaking now of custom at all. I was referred by the Taxing Masters to two cases in which I myself was, in which this point arose. I regret to have to differ from the Lord Chief Justice; but having formed a different opinion, I must express it.

I am satisfied that it is a matter of custom for Irish solicitors to enter into such contracts with English solicitors; and if we were to be compelled by the state of our law to hold that what I regard as a clear contract is unenforceable, it would hamper the solicitors' profession in the conduct of their business to an enormous extent. I do not think that we derive much assistance from the cases which have been cited dealing with the relationship

between solicitors in London and in the country. It is notorious that contracts relating to the carrying out of professional work are frequently entered into between such solicitors, all of which, if Mr. Gibson's argument be correct, must be illegal. An English country solicitor cannot, without taking out a particular licence, practise in London, but he can lawfully enter into a contract with a London solicitor to act for him in London, the latter receiving whatever remuneration is agreed upon. It is said that as the relationship of solicitor and client does not exist between them, the bill of costs could not be taxed, and that an untaxed bill could not be sued upon. This contention is not well founded. In an early case of *Smith v. Dimes* (1) the question was raised as to whether an attorney's bill for agency business was taxable under the statute 6 & 7 Vict. c. 73. A difference of opinion on this point appears to have existed between the Courts of Equity and of Common Law, but it was there clearly decided that such a bill of costs was taxable. It is not necessary, however, to refer to ancient authorities on this point. In *Storer v. Johnson* (2) the respondents, a firm of London solicitors, delivered to the appellants, solicitors in Manchester, a miscellaneous bill of agency charges, and subsequently sought to tax "the bill of fees, charges, and disbursements," in one particular suit, which formed part only of the miscellaneous bill. Lord Halsbury C. there said: "My Lords, it seems to me that there has been a considerable error about this case throughout. The summons, I cannot entertain any doubt, was intended to be taken out under the Solicitors Act. The reference to that portion of the Solicitors Act which makes the costs dependent upon the proportion which is taxed off convinces me, apart from the argument in the Court below, that the parties intended to insist upon their right to have this part of the costs severed from the rest, and to have that taxed by itself. My Lords, I am of opinion that that course is erroneous; and I believe that your Lordships are all of opinion that in a proceeding under the Solicitors Act, we cannot do what is asked to be done by the appellants. But it was of course open to the Court to pronounce a judgment which should do justice between the parties when once the case was brought before them. This was not a case in which

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(1) 4 Ex. 32.

(2) 15 A. C. 203.

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the summons absolutely bound the Court as to the remedy which they should administer; and I think it is quite clear that the Solicitors Act did not deprive the Court of the jurisdiction which they always possessed to do justice in the premises when dealing with one of their officers, and that they might therefore order that the costs should be taxed, although not in terms of the Solicitors Act, and they might have selected one particular portion of the bill of costs to be taxed. The moment it was taken out of the region of the Solicitors Act and brought within the general jurisdiction of the Court, then the Court could exercise its own jurisdiction in the way it might think fit."

That case shows that where an entire bill of costs is to be taxed no difficulty arises, and the bill can be taxed under the Solicitors Act; where part only of a bill of costs is to be taxed, the Court has inherent jurisdiction, apart from statute, to direct its taxation.

The case of *Sinton v. Albin* (1) has been strongly relied upon by Mr. Gibson. That case depended entirely on a question of fact, namely, whether in the circumstances there existing a direct privity of contract was constituted between the Scotch client and the Irish solicitor, and the Court came to the conclusion that such a privity of contract was established, and that in reference to the Irish business of the client, the Irish solicitor was substituted for the Scotch solicitor. Neither that case nor *Hyndman v. Ward* (2) can, to my mind, affect our present decision. The latter case only decided that no general practice or custom had been proved to the satisfaction of the Court, that where an Irish solicitor acted as agent for an English solicitor, the agent looked to the solicitor and not to the client for his costs. [His lordship read the judgment of Channell J. (p. 183), and continued.] That case can have no bearing on one where an express contract for the payment of costs between the English and Irish solicitors is proved to have been entered into. It is also argued that sect. 51 of the Solicitors (Ireland) Act, 1898, renders illegal such a contract as this. [His lordship read the section, and continued.] I ventured to point out during the argument that if this section has the effect contemplated for, the three ex-presidents of our Incorporated Law

(1) 38 I. L. T. R. 109.

(2) 15 T. L. R. 182.

Society, who have given evidence as to the mode in which they are accustomed to conduct their business, have rendered themselves liable to be struck off the Roll of solicitors, and to be committed to prison for a term of twelve months—a somewhat startling result; but I am clearly of opinion that the object of the section was to prevent unauthorized persons from practising as solicitors in Ireland under cover of some third person, and not to hamper and render impossible the ordinary working of Irish solicitors when acting as agents for English solicitors.

I am glad to think that this construction is supported by authority. In *Scott v. Miller* (1) Wood V.-C. said—"Now, no doubt the earlier part of that section" (the 32nd section of the Attorneys and Solicitors Act (6 & 7 Vict. c. 73)), "down to the words 'upon the account or for the profit of any unqualified person,' standing alone, would reach a very large class of cases which the Act was never intended to reach; such cases, for instance, as where a son carries on his father's business for the benefit of the family, or where a retiring solicitor stipulates with his successor that he shall be allowed an annuity in proportion to the profits. But it is quite clear that the statute was never intended to reach such cases as those; and this appears when you come to the subsequent words 'or do any other act thereby to enable such unqualified person to act as an attorney or solicitor.' This, therefore, was the mischief intended to be guarded against by the Act." It is clear, to my mind, that what occurred in this case is not within the mischief aimed at by sect. 51 of the Solicitors Act, 1898, any more than is the conduct of legal business by a solicitor who is employed by a large commercial undertaking, such as a bank, and who is paid by salary. Reliance has also been placed on sect. 1 of the Prevention of Corruption Act, 1906 (6 Edw. 7, c. 34). Now, there is such a thing as a remedial Act of Parliament being rendered nugatory by dragging within it, by a too literal construction, ordinary honest commercial transactions which were never within the mischief aimed at. To suggest that there was anything secret, or corrupt, or unlawful in this transaction is, to my mind, absurd.

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(1) 28 L. J. Ch. 584.

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There was no secrecy about it. The client could ascertain by a glance at the bill of costs that an Irish solicitor was employed to do work which had to be done, and for which, when done, the Irish solicitor was entitled to be paid. He could not be expected to do the work for nothing. No doubt he could not recover from the client, because he was not that client's solicitor; but that is no reason why he should not be paid. I certainly decline to yield to any argument based on the Prevention of Corruption Act as applicable to this case.

In my judgment the decision of the King's Bench Division was wrong, and should be reversed. I desire, however, to say a few words as to the form of the original judgment entered by Dodd J. at the trial. If one-third of the bill of costs be taxed off, I think that Kirtlan would find great difficulty in ever recovering his full professional charges against Kyl Fyre, Ltd., for the full work done. I think that the form of our judgment must be that judgment should be entered for the plaintiff for such sum as, on the result of the taxation, may appear to be due by the defendant to him, but giving credit for one-third of the costs properly allowed in respect of professional charges.

Subject to this I think that the judgment of Dodd J. should be restored.

RONAN L.J.:

The plaintiff in this action did certain work and labour at the request of the defendant. He is entitled to be paid for it by the defendant, unless the defendant establishes—1, that the plaintiff agreed to do it without payment; or 2, that the contract was that he was to be paid by some third party.

The parties never met. The communications between them are contained in the correspondence. What was the request to do the work? It is, "I shall be obliged if you will kindly commence proceedings in the Superior Court." It does not purport to be a request on behalf of anyone else. The title of the letter is "*Kyl Fyre, Limited, v. Thomas Scott.*" The plaintiffs are described as "my clients." The letter then gives the necessary information to enable the plaintiff to commence the action. It is *prima facie*, in my opinion, a request

by the defendant to the plaintiff to do certain work which is therein described, and nothing more. It is a letter such as would be written by a Belfast solicitor to a town agent in Dublin, or a Liverpool solicitor to his London agent. It is the case of one solicitor requesting another to issue a writ and attend to the proceedings in an action. Is there anything in such a letter to relieve the writer from the *prima facie* liability to pay?

The letter is written by an Eastbourne solicitor requesting another solicitor to institute an action in which a client of the former was to be the plaintiff. If this had been written by the defendant to a London solicitor, and the action had been brought, what would be the relation of the parties? What is the usual course of business in England when one solicitor does business for another? The effect of *Scrace v. Whittington* (1) was, in my opinion, this: In England, once the transaction is shown to be the employment of one solicitor by another to do work for the client of the latter, the only question for the jury is to whom the employed solicitor gave credit. There is *prima facie* no privity between the employed solicitor and the client. The giving credit shows that in the particular case there was nothing to take it out of the general rule.

In Roscoe's *Nisi Prius*, 18th ed., vol. i, p. 509, the law is thus stated: "Where one solicitor does business for another, the solicitor who does the business universally gives credit to the solicitor who employs him, and not to the client for whose benefit it is done. If the solicitor in such case intends not to be personally responsible, it is his duty to give express notice that the business is to be done on the credit of the client."

A commercial or professional usage may be so well established that the Courts will take judicial notice of it. The usages of the legal profession are peculiarly within the knowledge of the Courts. Solicitors are the officers of the courts. The Lord Chief Justice at the trial and the Court in Bank appear to have taken judicial notice of the usage in *Scrace v. Whittington* (1). It was treated as law by the Court. How has it been treated since? Roscoe brings it to 1907. The Annual Practice for 1916, p. 1961, states:—"The relation between London agents and country

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(1) 2 B. & C. 11.

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 1916. will be found in Daniel's Ch. Pr., vol. ii, at p. 1683.
PORTER In *Re Pomeroy* (1) Stirling L.J. says:—"It is well settled
v. that between the client and the London agent of the country
KIRTLAN. solicitor there is no privity. The relationship of solicitor
Ronan L.J. and client does not exist between the client and the London
 agent."

In *Robbins v. Fennell* (2) the defendants, who were town agents, issued a fi. fa. endorsed in their name "for" the country solicitor. They were the solicitors on the record. Lord Denman said:—"The town agent could not maintain an action for work and labour against the plaintiff, by whom he was not employed" (p. 256). In *Robbins v. Heath* (3), the Court held they could exercise summary power over the solicitor town agent, as an officer of the Court, to compel him to pay money to the lay client, though an action would not lie, as there was no contract between them. The same thing was done in *Re Edwards* (4), but it was not suggested by the Court that there was a contract with the lay client. At p. 265 Brett L.J. said:—"It is urged that it cannot do so because there is no priority" (this is plainly a misprint for *privity*) "between the town agent and the plaintiff, nor any relation between them of principal and agent. Granting this I do not think it follows that therefore the Court cannot exercise its summary jurisdiction over a solicitor who is an officer of the Court."

A similar application, under the summary jurisdiction, was made in Ireland in a case of *Re Fitton* (5). Mr. J. D. FitzGerald Q.C., in opening the case, said:—"Fitton is an officer of the Court. There may be a difficulty in sustaining an action for money had and received, on the *point of privity*, and we are entitled to relief through the summary jurisdiction of the Court. He then relies on *Robbins v. Fennell* (2) and *Robbins v. Heath* (3). The Court made the order. Monahan C.J. said, in the course of the argument:—"My difficulty is, if there is no legal privity, why should there be any liability on a petition?" This is put as a "*semble*" in the headnote. The judgment in *Robbins v. Heath* (3) is the answer to his difficulty. *Re Edwards* (4) puts the matter beyond doubt."

(1) [1897] 1 Ch., at pp. 284, 287.

(2) 11 Q. B. 248.

(3) 11 Q. B. 257.

(4) 7 Q. B. D. 155; 8 Q. B. D.

262.

(5) 6 Ir. Jur. O. S. 53.

Ball J. said: "In all the English cases the country attorney was the attorney on record. That is your difficulty here." This is an entire mistake on his part, as I shall show further on. In nearly every case he could not be the attorney on record. The case is important as showing that there can be no doubt that the Court considered the English cases on privity equally applicable in Ireland to the relations between the three parties—client, solicitor, and solicitor agent.

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The principle is therefore settled in both countries that though the absence of privity puts any liability in contract out of the case, the Court retains its full summary jurisdiction over the town-agent solicitor on the record, and can exercise it on the application of the country lay client. If there is no privity between them, and the relation of solicitor and client does not exist between them, it follows that there is no contract between them. The contract and privity are between the two solicitors only.

I take a summary of the law resulting from this from an old text-book (1): "There is in ordinary cases no privity between the principal party in the cause and the agent of the attorney or solicitor. The agent is solely employed by the solicitor, and looks to him only for payment, and cannot sue the client, nor be sued by him for negligence, or for money had and received, or otherwise in matters relating to his legitimate employment; the agent is, however, accountable to his immediate employer the attorney for the faithful discharge of his duties, and may be sued for negligence or other default by such attorney, who, in his turn, is liable to his employer the client for the default of his agent."

• The law will be found stated to the same effect in Halsbury, vol. xxvi, at pp. 844, 845, 846. I cannot find that this has been doubted.

I impute to the defendant knowledge of this ordinary law and usage incident to the daily practice of his profession; but this is proved by the correspondence in the present case. The entire correspondence is an admission by the defendant that the relations between the parties were according to this law and usage. When the matter of the company's compounding with its creditors arose, the defendant never even suggested that the plaintiff was a

(1) Pulling on Attorneys, 3rd ed., p. 446.

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creditor of the company. When he thought he would be driven into bankruptcy if the plaintiff persisted in his claim against him, he never suggested for a moment that it was on behalf of the company he made the contract with the plaintiff. I regard the correspondence, coupled with the law and usage of solicitors in England, as conclusive evidence that the defendant intended to contract on his own behalf when he wrote the letters. The plaintiff swears he gave credit to the defendant, and that he so understood it. This, I think, of itself entitles the appellant to succeed in this appeal, as the parties were *ad idem* as to the contract.

I quite agree with the Lord Chief Justice when he says—"In actions of contract evidence of custom or usage is valuable when there is any doubt or uncertainty as to the legal relation of the parties; but where they themselves have shown by their acts and words what they intended, evidence of custom cannot, I think, be relied on to show that a different legal relation subsisted between them."

In my opinion, the correspondence, read by the light of the ordinary law and the position of the parties, shows conclusively that the intention of the parties was that the contract was made and understood to be made between the plaintiff and the defendant as principals. The correspondence is in substance an admission of the plaintiff's claim against him by the defendant, and I would be prepared to decide this case for the appellant, apart from the express evidence of usage. As to the evidence of usage, it seems to me clearly admissible as evidence of the ordinary course and practice of the profession to which the parties belonged. Such course and practice can clearly be referred to in construing a contract relating to an ordinary transaction in the profession.

It is in no way inconsistent with the express contract between the parties. A man has a large business in a provincial town. He sends goods to all parts of the United Kingdom in large and small quantities. A solicitor whom he knows and trusts does his legal business. He directs him to get in his debts. The solicitor says: "Some of these debts must be recovered in the High Court in England; some in various English county courts; some in the High Court in Ireland; some in various Irish county courts. In all these courts proceedings must

be taken in your name by solicitors entitled to practise in these various courts. Shall I make separate contracts on your behalf with each of these solicitors, so that they shall be directly responsible to you, and you to them? or shall I undertake the entire job, engage the solicitors myself on my own account, so that I shall be the only person responsible to you for the carrying out of the proceedings, and you will have to deal with me alone?" Can there be the least doubt that the client would say—"I wish to deal with you, and you alone. I do not want to have any contracts or dealings with any of the various solicitors you refer to. Get the work done in the necessary way; engage whoever is necessary. I will pay you, and you will be responsible to me in the matter. I do not want to have anything to do with any of the solicitors you employ; I leave that to you entirely; but you must take the responsibility for the entire work."

Is there anything illegal or unreasonable in this? Is a man bound to make a separate contract with every county court solicitor whom his solicitor requests to issue a process in the county court or a summons at petty sessions on his behalf? If it is found more convenient that the only contract by the client should be with the principal solicitor, why should not they so arrange? The state of the law in England is conclusive evidence that this has been found the most convenient practice.

It is quite true that if the relation of solicitor and client does not exist between the plaintiff and the solicitor employed by his solicitor to take the proceedings, the employed solicitor is only bound to take directions from his employer. This only means that the client must give any directions he wishes to give through his own solicitor. If that solicitor refuses to obey his client's directions in this respect, the client has the same remedies as in any other case in which a solicitor refuses to do what his client directs. He could dismiss him, and then the employed solicitor would have no longer any authority to use his client's name (Halsbury, vol. 26, p. 848). This usage was declared to be universal by the King's Bench in 1823, and was then so well recognized that the Court took judicial notice of it. It has been treated as part of the law by every text-writer and judge who has had to deal with it ever since. The

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principle is not confined to solicitors. Mr. Bowstead, in his work on Agency, refers (inter alia) to the judgment of Bramwell L.J. in *New Zealand & Australian Land Co. v. Watson* (1) as an authority for the general proposition that "there is no privity of contract between a principal and sub-agent, as such, whether the sub-agent was appointed with the authority of the principal or not; and the rights and duties arising out of the contracts between the principal and agent, and between the agent and sub-agent, respectively, are only enforceable against the immediate parties thereto. Provided that the relation of principal and agent may be established by an agent between his principal and a third person, if the agent is expressly or impliedly authorized to constitute such relation, and it is the intention of the agent and of such third person that such relation should be constituted."

In *New Zealand & Australian Land Co. v. Watson* (1), Bramwell L.J. says, at p. 381: "It may have been no breach of their agreement with the plaintiffs to employ a sub-agent" (that is, they may have had authority to do so); "but they had no authority to make a contract of agency between the two," that is, between the principal and the sub-agent. Mr. Bowstead then refers to *Robbins v. Fennell* (2), and the other cases on solicitors and town agents as illustrations of the general rule. Indeed, the judgment in *Scrace v. Whittington* (3) is really a statement of the rule in its application to a solicitor employed as sub-agent.

The usage deposed to in this case appears to me to come to no more than this:—the rule of law or usage that where one solicitor employs another as his agent to do work for a client there is no privity between the client and the agent, applies to all such cases; and the cases of an English solicitor so employing an Irish solicitor, and vice versa, form no exception to the rule.

When an Eastbourne solicitor employs another solicitor to bring an action in Dublin for one of his clients, I find it difficult to see why the same relations should not exist between the parties as in the case of the action being brought in London. I confess I am wholly unable to understand the decision that this usage, when applied to the Irish transaction, is "illegal and repugnant to

(1) 7 Q. B. D. 374.

(2) 11 Q. B. 248.

(3) 2 B. & C. 11.

the ordinary rules governing the relations between solicitor and client," although it has been found so beneficial in relation to the London transactions that it passed into law nearly a century ago.

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The Court below seem to lay great stress on the fact that the agent was the solicitor on the record. The solicitor in whose name a writ, a civil bill, or a petty sessions summons is issued, is the solicitor on the record. I have already shown by the cases of *Robbins v. Heath* (1), *Re Edwards* (2), and *Re Fitton* (3) that the usage or law is quite consistent with the exercise of the summary jurisdiction of the Court at suit of the lay client over the agent of the solicitor, if solicitor on the record.

In England the certificate of a country solicitor does not enable him to practise in London, and for this reason nearly every country solicitor employs a London agent. (See Halsbury, vol. 26, p. 844.) Consequently the writ must be issued in the name of the town agent.

In 1914 a writ was issued in the name of such a country solicitor. The judge was asked to dismiss the action, but allowed it to stand over to allow the plaintiff to get another solicitor: *Richards v. Bostock* (4). It follows, therefore, that in all such cases the town agent is the solicitor on the record. Such a country solicitor is under the same disability to take proceedings in his own name in London as in Dublin. It would follow from the above statement that in the vast majority of cases in which the rule applies that there is no privity between the lay client and the London agent the latter must have been the solicitor on the record.

Solley v. Wood (5) was a motion by plaintiff to have her name struck out of the bill, and that W. & G., solicitors on the record, should pay the costs. The plaintiff had authorized S., a Canterbury solicitor, to file a bill for her. W. & G. were his town agents. The Master of the Rolls said:—"The next point is, that, although an authority might have been given to Mr. S., yet that none was given to Messrs. W. & G. It is the ordinary and

(1) 11 Q. B. 257n.

(2) 7 Q. B. D. 155; 8 Q. B. D.

262.

(3) 6 Ir. Jur. O.S. 53.

(4) 31 T. L. R. 70.

(5) 16 B. 370.

Appeal. 1916. recognized practice of country solicitors to employ a London agent. All that is required is, that he should appear to be acting as agent." Plaintiff was ordered to pay the costs.
PORTER v. KIRTLAN. It necessarily follows that it was the ordinary practice for the agent to be the solicitor on the record. At 8 Ch. App., p. 68, Lord Selborne refers to the Master of the Rolls as "a judge of great experience in all matters in relation to solicitors' costs."

Wray v. Kemp (1) was relied on for the defendant. In that case *Solley v. Wood* (2) was not cited. The writ was issued by the London agents in their own names, not as agents for the country solicitor. Chitty J. said :—"It is said that in substance those solicitors have been retained by the applicant, inasmuch as it is the usual practice when a country solicitor has been retained, to substitute the name of the London agents for that of the country solicitor. That may be a perfectly reasonable practice as between the solicitors themselves, but it does not make the London agents the solicitors of the party who gave the retainer to the country solicitor . . . A man employs a solicitor because he has confidence in him . . . I may add that I do not for an instant doubt that the London solicitors acted in perfect good faith." This shows—1, the usual practice; 2, that the fact that the London solicitors were the solicitors on the record does not make them solicitors for the lay client. The case itself has no bearing on the present; it only decided that an ambiguous retainer by an illiterate woman did not authorize the substitution of the names.

In *Re Scholes* (3) Clay was trustee of a will, and was defendant in a Chancery action. Scholes was his solicitor; Mayman was appointed co-trustee of the will. Mayman with the authority of Clay instructed Scholfield & Taylor (country solicitors) to have the costs taxed. They directed their London agents (Crossmans) to get an order for taxation. They presented a petition in the name of Clay, endorsed with their own name, and not as agents for Scholfield & Taylor, and an order was made for taxation. Clay moved to have the order set aside, on the ground that Crossmans were not authorized to proceed in their own names as

(1) 26 Ch. D. 169.

(2) 16 B. 370.

(3) 32 Ch. D. 245.

solicitors on the record. *Wray v. Kemp* (1) was cited. Pearson J. said :—" I must say that this motion is not creditable to the quarter from which it issues. It seems to have been decided that strictly and technically a London firm, acting as agents for country solicitors, ought to take all proceedings so as to show the name of their principals . . . But Mr. Justice Chitty seems to have held that a London agent had no right to endorse his own name on proceedings as principal, and that if he did the proceedings could be vacated by the client. Under these circumstances I must grant the application. As to giving costs, I only regret that I cannot make the parties who have made the application pay costs." It is plain from this that both Mr. Justice Chitty and Mr. Justice Pearson regarded the practice of the proceedings being taken in the name of the agent as the usual practice, and the latter treated the omission of the "agent for" clause as a pure technicality. I cannot imagine how it can be supposed to affect the rights of the solicitor and agent inter se. Even Mr. Justice Chitty expressly says :—" This may be a perfectly reasonable practice between the solicitors themselves." The present case is a case between the solicitors themselves. But how does all this apply to Ireland? By sect. 6 of the English Common Law Procedure Act, 1852 (15 & 16 Vict. c. 76), it is provided that every writ shall be endorsed—*a*, with the name of the attorney actually suing out the same; *b*, and if not an attorney of the Court, then also with the name of the attorney of the Court in whose name the writ shall be taken out; *c*, and if the attorney suing out the writ is agent for an attorney in the country, also with his name.

The corresponding section, 12, of the Irish Act of 1853 (16 & 17 Vict. c. 113) has *a* only. It contains no such provisions as *b* and *c*.

The last clause of the English Order IV, Rule 1, is: "And where any such solicitor is only agent of another solicitor, he shall add to his own . . . name the name of . . . the principal solicitor." When this rule was adopted in the Irish Order IV, Rule 1, this last clause was deliberately omitted. I confess I cannot understand how the Court below drew any inference from the fact that Mr. Porter issued the writ in the only form in which he could have issued it at all.

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The section of the English Common Law Procedure Act is the same as sect. 12 of 2 Wm. 4, c. 39. There is a similar provision as to the endorsement of the name of the attorney immediately employed, and of the agent who sues out the writ in 2 Geo. 2, c. 23. (See *Shephard v. Shum* (1).) This shows that as far back as 1729 the practice existed in England of one solicitor employing another to issue the writ. There was, therefore, ample room for the "universal practice" referred to in *Scrace v. Whittington* to grow up. I can find no trace in Ferguson's Practice of any rule in Ireland that a solicitor employed by another shall endorse the employer's name and his own on the writ. Probably the old Irish rule that every solicitor must have an office in Dublin, and, therefore, can issue writs in his own name, accounts for this, and also for the absence of cases on the subject in Ireland. In *Fitton's Case* (2) the reason why the writ was issued in the agent's name was that the principal had failed to take out his licence.

As to the proof of the usage, we have the evidence of the plaintiff and of the three distinguished members of the solicitors' profession who gave evidence on the subject. No objection was taken to this evidence, and none of the witnesses was cross-examined on the subject. It is obvious that the questions were put in the usual general form to the witnesses, and their replies stated definitely and as a fact what the usage and practice were. I was surprised to hear it argued that this was no evidence of the usage or practice, and that the only admissible evidence of the usage would be evidence of particular instances in which it had been acted on. I thought the practice was quite settled the other way. In my experience at the Bar the practice was always as stated at p. 92 of the 1911 edition of Phipson, viz.: "Such usages may be proved, either, 1, by direct evidence of witnesses . . . in which case particular instances of its occurrence or non-occurrence will be admissible in corroboration or rebuttal; or 2, by a series of particular instances in which it has been acted upon." No authority was cited in support of this contention by the appellants. I think it wholly fails.

The law, custom, or usage is that where a solicitor employs another to bring an action for a client the privity (in the absence

(1) 2 C. & J. 632.

(2) 2 B. & C. 11.

(3) 6 Ir. Jur. O. S.

of express contract) is between the two solicitors and not between the client and the employed solicitor, and that this extends to such employment between English and Irish solicitors. An Irish solicitor can only bring an action in his own name simply as solicitor.

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Can an English solicitor make an express contract with an Irish solicitor to bring such an action on the terms that the contract shall be solely between them, and that there is to be no contract, express or implied, between the client and the Irish solicitor? Can a Dublin solicitor make a similar contract with a county court solicitor in respect of a process? If such contracts are not illegal, I am wholly unable to see how a usage annexing these terms to a contract can be illegal. The usage only operates as a term of the contract. It is treated as an implied term. If it is illegal as an implied term, it surely must be equally illegal when expressed.

We all know that Irish solicitors constantly bring such actions on the instructions of English solicitors. We all know that when the action is an important one the English solicitor retains the control of the proceedings. Sometimes he comes over himself. Sometimes he sends his conducting clerk, generally himself a solicitor. On one occasion in my own practice an English solicitor brought an English counsel with him to consultation to teach us the law. In such cases he does a great part of the work of the action, conducts all the interviews with the client and the witnesses, takes the evidence, prepares the cases for counsel, and the briefs, &c., and generally assumes the real responsibility for the conduct of the action. And this is what the client wishes to be done. He is the person in whom the client has confidence. He knows all about the case. It seems to me absurd to suggest that there is anything illegal in doing what I have referred to as being the usual course in such cases.

In such a case if the action succeeds it is obvious that the defendant should pay all the costs, as if all the necessary work had been done by the solicitor on record. Accordingly, his party and party costs must be prepared on this basis.

But as between the Irish solicitor and the English solicitor is it fair or just that the entire profit should be given to the former?

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Surely in such circumstances it is only fair and just that the profit should be divided between the two parties who had worked to earn it. The usage in this respect is a rough general rule to meet ordinary cases, but it can be varied by the parties when the circumstances require it.

Lord Justice Molony suggested during the argument that the defendant can only recover these costs in the action from his client as money paid for his use. I am unable to agree in this. In my opinion, the defendant was employed by the client to bring the action in Ireland, and as between them, all the work he did in the action he did as the client's solicitor, and he was entitled to be paid his reasonable costs, including reasonable profit, by the client. I quite agree that if he was paid for this wholly or in part out of the costs recovered in the action or out of a bill of costs, the whole of which was paid by the client, he could not claim this over again. But I wholly refuse to impute to the plaintiff or defendant in this action any intention to commit a fraud on the defendant's clients by suppressing the fact that the defendant had been already paid for work for which he was claiming payment. The defendant's counsel did not suggest such a fraud as this, but they rather casually suggested that it was an illegal secret commission. This in substance is really the same thing. I am clearly of opinion that such a fraud or illegality is one that should have been pleaded, according to Lord Haldane's judgment in *North Western Salt Co., Ltd., v. Electrolytic Alkali Co., Ltd.* (1). I am further clearly of opinion that no such fraud or illegality has been proved here. I am also of opinion that it is not illegal under the Solicitors Act for an English solicitor to employ an Irish solicitor to bring an action under his directions for an English client. I agree that this appeal ought to be allowed.

MOLONY L.J. :—

I regret that I am unable to concur in the judgment of the Court, and I wish to state very briefly the reasons which have led me to a different conclusion.

(1) [1914] A. C., 461, at p. 469.

This action was brought by the plaintiff, who is a solicitor in Belfast, against the defendant, who is a solicitor in Eastbourne, to recover the sum of £102 15s. 2d., balance of account due for professional services rendered by the plaintiff, as a solicitor, in and about the business of the defendant, at his request. The particulars set out that the amount sued for is the balance due on the costs drawn as between solicitor and client in the action of Kyl Fyre, Limited, against Thomas Scott, after giving credit for £20 received on account on the 13th June, 1911.

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The defendant, in his defence, states that the plaintiff in this action undertook to act as solicitor in this country for Kyl Fyre, Limited, in the prosecution of an action by the said company against Thomas Scott, and that the costs so incurred were incurred by the plaintiff on behalf of and as solicitor for the said Kyl Fyre, Limited, and the defendant submitted that he was under no liability in respect thereof to the plaintiff.

It appears from the correspondence that on the 2nd September, 1910, the defendant wrote a letter to the plaintiff, headed "Kyl Fyre, Limited, and Thomas Scott," setting forth the nature of the claim of Kyl Fyre, Limited, against Scott, and stating that he should be obliged if the defendant would kindly commence proceedings in the superior courts, claiming £50 damages for trespass.

The plaintiff on the following day wrote to the defendant stating that he was having proceedings taken, and, accordingly, an action was commenced against Scott, which, in the end, was determined mainly in favour of the defendant Scott, and left a bill of costs due to the plaintiff in this action by somebody.

The judge at the trial determined that although there was no express contract for payment between the plaintiff and defendant (and in this I agree with him) the defendant was nevertheless liable on the ground that he found a custom to be proved that where an English solicitor on behalf of an English client instructs an Irish solicitor to take proceedings in an Irish Court, or to act professionally for him in any matter; or conversely, where an Irish solicitor instructs an English solicitor to take proceedings for an Irish client in an English Court, or to act professionally for him in any matter, there being no express agreement contravening the

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1916. — recover from the solicitor who gives the instructions the entire
PORTER sums reasonably and properly spent on outlay, and two-thirds
v. of the sums reasonably and properly incurred for professional
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The King's Bench Division set aside this finding upon the ground that the custom was not proved, and further, that such a custom could not legally exist.

It is to be remembered that what the judge has found in this case is not a custom by which an Irish solicitor, when he takes proceedings on the instructions of an English solicitor, and is paid by the English solicitor's client in respect of the work, transmits to the English solicitor an agreed proportion of the profit costs as a commission for introducing the business; what Mr. Justice Dodd has found was, not that Mr. Porter had waived any legal right as against the so-called clients, but that he never had any such right in the circumstances of the case. This is a somewhat startling proposition, and I have examined the evidence with care to see if it supports the view taken by the learned judge.

Mr. Porter, in his evidence, stated that, so far as he was aware, there was a general custom to look to the English solicitor, and not to the client, for payment; but he is silent whether it is as to the whole amount, or only a proportion thereof. It is, of course, quite true that in the ordinary case the application is made to the English solicitor, who would collect the amount from his solvent client; but it does not at all follow that there was a legal liability on the part of the English solicitor.

Mr. Richard Blair White, however, puts the matter upon a different basis altogether. He stated that he is always paid by the solicitor, and not by the client, and that he gets outlay, and two-thirds professional charges, and that the English solicitor gets one-third of the professional charges. I think that Mr. Blair White's evidence is conclusive in this case against the custom found by Mr. Justice Dodd. If this custom is established, how is the English solicitor to get his one-third? If the English solicitor becomes personally liable to the Irish solicitor, the English client would become liable to the English solicitor on a contract of indemnity, and not otherwise. The English solicitor

could only sue his client for money paid for his use, and he could only recover the money he actually paid, and could never recover the one-third. This view is strongly supported by the evidence of Sir John Lynch, who referred to the fact that the usual form of letter runs:—"Will you act for us on the usual agency terms?" and that the result of that is that the solicitor in England gets one-third of the net profits. I asked Mr. Best how, on this custom being established, the English solicitor could ever get one-third of the net profits, and he was unable to give me any satisfactory answer. We now come to the evidence of Mr. Hayes, who says that, in the absence of any special contract, the custom is to look to the solicitor, and not to the client, and that the usual terms are one-third professional charges to the English solicitor.

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I am of opinion that the evidence of the three eminent solicitors who were examined for the plaintiff is consistent only with the payment by the client in England of the whole amount of the bill, and the repayment afterwards by the Irish solicitor to the English solicitor of a proportion of the net profits.

I am not expressing¹ any opinion as to whether the one-third is legally recoverable by the English solicitor, as against the Irish solicitor, on payment being made to the latter by the client. The legality of the payment would, of course, depend upon the knowledge of the client, and other circumstances which it is not necessary to discuss in the present action.

Let us now see exactly what were the relations between the parties in the action of *Kyl Fyre, Ltd., v. Scott*. On the 2nd September, 1910, Mr. Kirtlan wrote to Mr. Porter in reference to this case. Mr. Porter, however, did not issue the writ on the instructions of Mr. Kirtlan alone, because the first item in the bill of costs which he has furnished is:—"Instructions to proceed, including all perusals and correspondence with Mr. Varley Kirtlan, English solicitor for the plaintiff company, obtaining information; and attendances on Mr. Southam, plaintiff's agent, obtaining particulars." It thus appears to be clear that so far from Mr. Porter acting solely on the instructions of Mr. Kirtlan, he at once put himself into communication with Mr. Southam, who was the agent for the *Kyl Fyre Company*, residing in Dublin, and obtained particulars from him.

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I have considered the correspondence, which has been so fully dealt with by the Lord Chancellor. So far as the letters which were written during the progress of the litigation are concerned they do not, in my opinion, create a direct personal liability. Some of the letters, written by Kirtlan after the costs were demanded of him, are relied on as admissions; but I think they are not sufficient to create a liability if no such liability previously existed. On this branch of the case I agree with the statement of the Lord Chief Justice that the plaintiff, having issued the writ in the action of *Kyl Fyre, Ltd., v. Scott*, describing himself as "solicitor for the plaintiffs" in that action, and having received a payment on account of his costs by a cheque for £20 drawn by the Kyl Fyre Co., whom, in his own action, he describes as his clients, cannot now be allowed to say that his clients were not *Kyl Fyre, Ltd.*, at all, but *Kirtlan*.

The plaintiff relies upon the case of *Scrace v. Whittington* (1), as conclusive in his favour. We were referred to the report in *Barnewall and Cresswell*, but the case is more fully reported in *Dowling and Ryland*. An examination of the case shows that it is only an authority for the proposition that where there is a dispute as to the person to whom credit is given, the question is one for a jury. In that case it was held that the credit had been given to the attorney, and the ground of it appears to be clear from the judgment of Best J., as reported in *Dowling and Ryland*, where (at p. 197) he said:—"This was entirely a question of fact, to whom did the plaintiff give credit, and the jury have decided it correctly. The credit was undoubtedly given to the attorney, for the name of the client was not mentioned when the order to do the business was given. He could not possibly expect therefore to look to her for payment."

The plaintiff further tried to contend that the relation between an English solicitor and an Irish solicitor is the same as that between a London agent and an English country solicitor. It has been settled in England that the London agent is entitled to be repaid his disbursements, and to receive half the

(1) 2 B. & C. 11; 3 Dow. & R. 195.

profit charges in respect of the business done by him: *Ward v. Lawson* (1).

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The form of writ in England provides in express terms that where a writ is issued by a London solicitor on the part of his country correspondent the endorsement shall be in the following forms:—

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This writ was issued by G. H. of _____, whose
address for service is _____, agent for
_____, of _____, solicitor for the said
plaintiff, who resides at _____.

This form, therefore, at once gives notice to the defendant and his solicitors that the country solicitor is the solicitor acting for the plaintiff, and that the solicitor in London is his agent for the purposes of the proceedings. The liability for costs, however, is to the country solicitor alone, and it has been held by the Court of Appeal in England that where a country solicitor employs a London agent, he must in his bill state in detail the items of the London agent's charges:^f *Re Pomeroy & Tanner* (2).

There is no analogy between this practice in England and the case where an English solicitor employs an Irish solicitor to do business, which, under no circumstances, could the English solicitor do himself, and which, if paid for by the English solicitor, could only be recovered from the English client in an action for money paid.

The case of *Hyndman v. Ward* (3), relied on by the defendant, is not of much assistance. The plaintiff in that case was an Irish solicitor who sued an English client, and it was suggested that the practice when an Irish solicitor acted as agent for an English solicitor was the same as when one solicitor in England acted for another. The Court, however, held that, whatever the practice might be in England, there was no such general practice between Irish and English solicitors as to justify a judge in finding that such a practice existed in contradiction to sworn evidence not impugned, and that the general law of principal and agent therefore applied to the case, and that the defendant was liable.

(1) 43 Ch. D. 353.

(3) 15 T. L. R. 182.

(2) [1897] 1 Ch. 284.

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In that case the only evidence given was that of Mr. Hyndman, who denied the existence of any such practice as was found in England, and his evidence was similar to the evidence given by Mr. Hamilton in the present case. The case is of importance only as showing that such a practice, if it existed, might be proved in evidence, and recognized by the Courts; but in my judgment such a custom is very far from being proved by the evidence given in the present case.

On the other hand, the case of *Sinton v. Albin* (1) is an authority that in circumstances similar to those in the present case the Court will regard the Irish solicitor as agent for the English client. The judgments in the Court of Appeal are not reported in the Irish Law Times, but I have looked at Mr. de Versan's note of the case, which, as usual, is full and accurate. In *Sinton v. Albin* (1) it appeared that a person living in Scotland was threatened with an action in Ireland, and he went to a Scotch solicitor, who informed him that it would be necessary to employ an Irish solicitor, and an Irish solicitor was accordingly employed; and a question arose as to whether two letters written by the Irish solicitor were an acknowledgment satisfying the requirements of the Statute of Limitations. They could not be an acknowledgment unless the Irish solicitor was agent for the Scotch client. FitzGibbon L.J. says:—"I think this is simply a question whether the writer of the letters was agent for the defendant. I think he was. Power was given to the Scotch solicitor to employ an Irish solicitor. I am of opinion the letters do amount to an acknowledgment." Holmes L.J. says:—"When once the facts are properly understood there can be no doubt. When Albin is threatened with litigation he goes to a Scotch solicitor, who informs him that it will be necessary to employ an Irish solicitor. The arrangement between the parties was that the Irish solicitor should be agent for Albin with all the ordinary authority of a solicitor. The subject-matter was a judgment mortgage. The letters are an admission of the judgment debt."

I cannot help thinking that the judgment of Mr. Justice Dodd if allowed to stand would have a most unfortunate effect upon the relations between English and Irish solicitors. An English

solicitor instructs an Irish solicitor to do work for an English client in respect of a purchase or sale, or other non-contentious matter. The only way by which a bill of costs in that case can be taxed is on a requisition signed by the English client (Order LXV, Rule 54 (b)), and upon his written undertaking to be lodged with the taxing-master to pay any balance which the taxing-master may certify.

Under the judgment in the present case it would be obviously wrong for such a requisition to be presented to the taxing master, as the only person liable is the English solicitor. The English solicitor is not liable for the entire bill, and the requisition could not be signed by him. There would then have to be a new form of requisition by which the English solicitor would ask the taxing master to tax the bill on the basis of Mr. Justice Dodd's judgment, giving the Irish solicitor his outlay and two-thirds of his professional charges. Such a requisition is certainly not recognized by the rules of Court.

On the whole case I am of opinion that the alleged custom has not been proved, and I do not consider it necessary to discuss the question whether any such custom can legally exist. I think, therefore, that the order of the King's Bench Division entering judgment for the defendant was right and ought to be affirmed.

Solicitors for the appellant: *Neilson & Son.*

Solicitors for the respondent: *Hamilton & Craig.*

R. ST. J. C.

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PORTER
v.
KIRTLAN.
—
Molony L.J.

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May 31.
June 1, 30.

Appeal.
Nov. 15, 16,
17, 25.

R. (LOCAL GOVERNMENT BOARD AND COSGRAVE)
v. M'LOUGHLIN (1).

Local Government—District Lunatic Asylums—Accounts—Audit—Accounting Officer—Resident Medical Superintendent—"Secretary or Clerk"—Right to call upon to assist at Audit—Powers of Local Government Board and their Auditors in reference to Asylum Officers—Rule-making Authority—Function of Auditor—Local Government (Ireland) Act, 1898 (61 & 62 Vict. c. 37), sect. 9, sub-s. 6, and sect. 108; Local Government (Ireland) Act, 1902 (2 Edw. 7, c. 38), sect. 22; the Public Bodies Order, 1904; the Public Bodies Order, 1915.

Pursuant to the Local Government (Ireland) Acts, 1898 to 1902, the Local Government Board on 5th February, 1915, made an order entitled "the Public Bodies Order, 1915," which provided that "the clerk or chief clerk of the Asylum Committee shall attend at the time and place appointed by the auditor for the audit of the accounts, and shall render to the said auditor all such assistance during the course of the audit as he, the said auditor, may from time to time require, whether by preparing returns, producing documents, calling back accounts, vouchers, or other documents, or otherwise as to the said auditor may seem requisite for facilitating or expediting the said audit."

Held (affirming the King's Bench Division, CHERRY L.C.J. and GIBSON J., KENNY J. dissenting), that the Resident Medical Superintendent was the person bound to perform the duties prescribed in so far as these duties were imposed upon "the secretary or clerk."

Held also, that the rule-making authority for regulating the government of lunatic asylums and officers and servants thereof was the committee, with the approval of the Lord Lieutenant; that the Local Government Board had no statutory authority to impose duties on the officers of asylums, and that the Public Bodies Order, 1915, so far as it affected these officers, was ultra vires.

Held further, that the audit of asylum accounts should be an independent investigation by the auditor himself, and that he had no power to delegate any part of his duties and functions to the accounting officer, or any other official whose accounts were being audited.

(1) In the King's Bench Division, before CHERRY L.C.J., and
GIBSON and KENNY JJ.

MANDAMUS.

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On the 30th November, 1915, Maurice J. Cosgrave, one of the prosecutors, was appointed by the Local Government Board to audit the accounts of the Joint Committee of the Clonmel District Lunatic Asylum for the half-year ending the 30th September, 1915. He attended on the 15th of December, 1915, at 11 a.m., at the Boardroom of the Joint Committee in the asylum at Clonmel; having previously forwarded to the resident medical superintendent the prescribed notice of the time and place of the audit, for the purpose of auditing the accounts. The resident medical superintendent and the assistant superintendent attended, but the defendant, Mr. J. M'Loughlin, who occupies the position of clerk of the committee, was not present. In obedience to a demand by the auditor the defendant attended, and the auditor informed him that he proposed to make a start by checking the admissions, and for that purpose he asked the defendant to call off the entries in the register of admissions that he might check the names, dates, and other particulars in the commission warrants against entries in the morning statement book. This the defendant declined to do, saying that he did not recognize the Public Bodies Order, 1915. Thereupon the auditor handed the defendant the following written demand:—"I hereby require you in the discharge of your duty as clerk to the Clonmel District Lunatic Asylum, and under the obligations cast upon you by the Public Bodies (Ireland) Order, 1904, and the Public Bodies (Ireland) Order, 1915, to attend upon me at audit and to give such assistance as I may require in the preparing of returns, producing documents, the calling back of accounts, vouchers or other documents as laid down by these orders." In a written reply the defendant stated that, "having regard to the resolutions of the Joint Committee of Management of the 9th March, 1915, and 9th November, 1915, respectively, I must decline to render you the assistance which you maintain is portion of my duty as clerk of the asylum. I am quite prepared to give you all the information you may require arising out of your inspection of the accounts with which I have to deal, and to furnish you with the necessary explanations." In the resolutions

K. B. Div. of the Joint Committee referred to, that body declined to accept
 1916. the Public Bodies Order of 1915, and stated that it was most
REX unreasonable that any official should be called upon to "call back"
 (L. G. B. & or check at the audit any entries made by him, or for the accuracy
 COSGRAVE) of which he was responsible.
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The prosecutors obtained a conditional order for mandamus directed to Mr. M'Loughlin alone, commanding him to attend the audit, and to render to the auditor for the time being all such assistance during the course of the audit as he may from time to time require, whether by preparing returns, producing documents, calling back accounts, vouchers, or otherwise, as to the auditor may seem requisite for facilitating or expediting the audit. Mr. Cosgrave in his affidavit stated that, in pursuance of his duties as auditor, the clerk or accountant or other officer of other public bodies, including Asylum Committees, had given him the assistance which he had called upon the prosecutor to render. Without such assistance the time occupied by each audit would be greatly prolonged.

In an affidavit showing cause the respondent stated he was clerk of the Clonmel District Lunatic Asylum, but not clerk to the joint committee of management. The resident medical superintendent acted as secretary or clerk of the joint committee, and in that capacity signed all forms, abstracts of accounts, and minutes of the committee.

During the twelve years ended March, 1912, the accounts had been audited by three auditors, and the respondent had never been asked by any of these to call off the entries in the register of admissions for purposes of checking against the entries in the morning statement-book, nor was he requested by any of them to call back entries from the bills furnished by contractors for checking with the storekeeper's books. As he was conversant with the procedure adopted by chartered and other experienced accountants in similar matters, he declined at the audit in 1914, for the half-year ended 30th September, 1913, which was opened by Mr. Considine, predecessor of the prosecutor, Mr. Cosgrave, to call back entries from the bills of contractors for comparison with the storekeeper's books, which "I was responsible for checking," pursuant to the asylum rules. "Such a request was," he swore,

“tantamount to an invitation to me to review my own work, a violation of the first principles of auditing, and an opportunity to the unscrupulous for the committing of frauds.” To this objection the Local Government Board replied, in a letter of 22nd March, 1914, that the auditor would have been careful not to ask the clerk to call out the quantities from the bills had he entertained any suspicion that the clerk would attempt to act in such a manner; but he had quite sufficient confidence in Mr. M'Loughlin to warrant him in taking this risk. In a former letter, dated the 9th February, 1914, the Board had stated that the particular branch of work (calling back from bills which had to be checked against entries in the storekeeper's books) which the clerk refused to discharge was one which necessarily and properly should have been discharged by him, “inasmuch as it would be obviously undesirable that the officer on whom is imposed the duty of writing up the particular books under review, which show the quantities of goods for which he is accountable, should himself be the person to call out to the auditor from the invoices the items and the quantities thereof recorded in the store books.”

Ultimately, proceedings were taken at the criminal side against Mr. M'Loughlin under sects. 14 and 15 of the Local Government Act, 1871. A true bill was found against him at the Clonmel Summer Assizes, 1915, on the charge of having unlawfully refused to attend the audit in obedience to the summons of the auditor, and to produce all necessary books and documents. He was also charged with having failed to present himself “to answer upon oath such questions as should be put to him (by the auditor) upon matters connected with the accounts . . . and the audit thereof,” When the case was about to be tried, it was announced that Mr. Considine had apologized for any unpleasantness he had caused, and acknowledged that Mr. M'Loughlin was “quite within his right in objecting to calling over the bills.” Mr. M'Loughlin, it was stated, undertook to attend any future audits, and would afford any proper information or explanation within his power.

On the 28th April, 1915, Mr. Considine opened the audit for the half-year to the 30th September, 1914. Mr. M'Loughlin attended to give any explanation in accordance with the under-

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K. B. Div. taking come to at the Assizes, and gave explanations which the auditor deemed satisfactory. When requested by the auditor to call off from the admission book the record of patients, for purposes of checking with the morning statement-book, he declined to do this, as the entries were made by himself in both these books. He referred the auditor to the settlement made at the Assizes, and "he thereupon stated that he was no party to the settlement, and repudiated same."

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Mr. Cosgrave was next appointed to audit the accounts, and what occurred between him and Mr. M'Loughlin has been already related. In a replying affidavit Mr. Cosgrave referred to the minutes of the asylum committee of the 10th April, 1900, from which it appeared that Mr. M'Loughlin was on that date appointed by the committee to the position of clerk. The Rev. C. Flavin, chairman of the committee, in an affidavit in support of the attitude taken up by the respondent, stated on behalf of the committee that it was undesirable that the clerk of the asylum should call back to the auditor entries from bills of contractors, which the clerk was responsible for checking under the asylum rules. Under the adaptation to the asylum of the Public Bodies Order, 1904, sanctioned by the Local Government Board in 1906, the respondent was not secretary or clerk of the joint committee of management, but was a subordinate officer. The resident medical superintendent was clerk of the joint committee, and acted as such.

Under sect. 9, sub-s. 6, of the Local Government (Ireland) Act, 1898 (61 & 62 Vict. c. 37), the joint committee made formal rules respecting the government and management of the asylum, and these rules were approved on the 4th June, 1902, by the Lords Justices, acting in the absence of the Lord Lieutenant. These rules prescribed the duties of the resident medical superintendent and of the clerk respectively. The resident medical superintendent was bound, under these rules, to supervise and regulate the whole establishment, to be careful that the prescribed books were kept with regularity, and to be responsible for the manner in which the various duties of the clerk and of the store-keeper were performed. During specified hours the clerk was bound to attend at the office and take charge, under the direction

of the medical superintendent, of the various ledgers and books; to keep the statutory register of admissions, discharges, and deaths, and to be responsible for the checking of the storekeeper's books and accounts.

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The Local Government Board, in pursuance of the powers conferred upon it by sect. 108 of the Local Government (Ireland) Act, 1898, and sect. 22 of the Local Government (Ireland) Act, 1902 (2 Edw. 7, c. 38), issued on the 17th of December, 1904, a general order entitled: "The Public Bodies Order, 1904" (1). This order, divided into eight parts, contained a number of articles dealing with the accounts and payments of local bodies, the audit of their accounts, and the making and collection by them of poor rate. Part I, applicable to county councils, county borough, and district councils, prescribed in articles 5 to 24, inclusive, the duties of "the secretary or clerk" in respect of accounts and payments, and in articles 25 to 39, inclusive, the duties of the same officer in regard to audit were prescribed. The expressions "secretary" and "clerk" were defined in article 2 (*d*) as including "any person, by whatever name called, who performs, or may be required to perform, under or by direction of the public body, any duty or duties herein directed to be performed by a secretary or clerk." Part VI, article 103, provided that Part I should apply, with the necessary modifications, to asylum committees. Article 110 provided that the abstract of the accounts of asylum committees, and the superintendent's half-yearly statements, as required for audit by article 25, should be prepared in accordance with forms 68 and 69 in the schedule. The returns prescribed by these forms were directed to be prepared and certified by the medical superintendent.

Article 3 (*b*) is as follows:—"The Local Government Board may from time to time assent to any departure from such rules and regulations." In a letter dated 12th March, 1906, to the asylum committee, the Local Government Board assented to certain departures from the terms of the Public Bodies Order, 1904, and under the heading "generally," stated:—"In the application of the Public Bodies Order to lunatic asylums, the

(1) See 2 Vanston, Local Government, p. 1663.

K. B. Div. Local Government Board regards the words 'secretary or clerk' as meaning the resident medical superintendent. The order and forms are to be so read. Subject, of course, to the superior control of his committee, and other duly constituted authority, the resident medical superintendent is responsible for the entire management of his particular institution. It rests with him, therefore, to require books and documents to be prepared, verified and kept by specified subordinate officers, subject to his supervision and control. He cannot be permitted to divest himself of the responsibility for seeing that they discharge those duties in a satisfactory manner, or, should they fail to do so, for reporting their negligence to his committee, so that they may be suitably dealt with."

By a general order of the 5th February, 1915, entitled: "The Public Bodies Order, 1915," the Local Government Board reproduced article 110 of the Order of 1904, and made the following additional provision:—"(2) The clerk or chief clerk of the asylum committee shall attend at the time and place appointed by the auditor, for the audit of the accounts, and shall render to the said auditor all such assistance during the course of the audit as he, the said auditor, may from time to time require, whether by preparing returns, producing documents, calling back accounts, vouchers or other documents, or otherwise as to the said auditor may seem requisite for facilitating or expediting the said audit" (1).

The Right Hon. the Attorney-General (Campbell K.C.) and Wyllie K.C. (with them Sealy), for the prosecutors.

Clancy K.C. and Muldoon K.C. (with them Kinahan), for the respondent.

The arguments were the same as in the Court of Appeal, *infra*.

June 30.

KENNY J. :—

The point of substance in this case is, whether a general regulation dated the 5th February, 1915, made by the Local Government Board in assumed pursuance of the Local Government (Ireland) Acts, 1898 to 1902, is valid—or whether it is bad

(1) *Dublin Gazette*, 19th Feb., 1915, p. 336.

on the ground of ultra vires. Efficacy is claimed for it under sect. 22 of the Local Government (Ireland) Act, 1902.

The application before us is one to make absolute a conditional order for a mandamus, dated the 17th February, 1916, granted at the instance of the Local Government Board and of one of its auditors, Mr. Maurice Cosgrave. The conditional order is directed to Mr. M. J. M'Loughlin as clerk to the joint committee of the Clonmel District Lunatic Asylum, and commands him—unless cause to the contrary be shown—to attend the audit of the accounts of the joint committee and to render to the auditor all such assistance during the course of the audit as he may from time to time require, whether by preparing returns, producing documents, calling back accounts, vouchers, or other documents, or otherwise as to the auditor may seem requisite for facilitating or expediting the audit.

The conditional order follows the words of Article 110 (2) of the general regulation of the 5th February, 1915, to which I have referred, and it directs service of the order on Mr. M'Loughlin on his own behalf and for and on behalf of the joint committee of the asylum.

Cause against the conditional order has been shown by Mr. M'Loughlin, but merely on his own behalf. The joint committee have not appeared.

The history of the controversy between the Local Government Board and its auditor on the one hand and the clerk of the asylum on the other, may be stated in a very few words. The Clonmel Lunatic Asylum is the asylum for both the north and south ridings of the Co. of Tipperary and is under the control of a joint committee of management. The asylum is managed by a general resident medical superintendent, while Mr. M'Loughlin is the clerk of the asylum. He claims that it is a misnomer to refer to him as clerk of the committee and that the medical superintendent is the person who fills that position. He has acted as clerk of the asylum, professedly, since the year 1900, and has apparently attended the audits of the asylum accounts from time to time in respect of such matters as came within his province. It would seem that no friction in connexion with audit arose until January, 1914, when the clerk declined to continue a practice to

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K. B. Div. which I would gather he had not hitherto objected—namely,
 1916. of assisting the auditor by comparing or “calling back” the
 REX entries in one book with those in another. He states in his
 (L. G. B. & affidavit by way of cause against the conditional order that the
 COSGRAVE) request of the auditor for such comparison or “calling back” was
 v. “tantamount to an invitation to me to review my own work—
 M’LOUGHLIN. a violation of the first principles of auditing, and an opportunity
 Kenny J. to the unscrupulous for the committing of frauds,” and that
 on the 4th February, 1914, he declined to carry out the
 auditor’s directions as to “calling back.” These grounds for
 refusal to “call back” items were strongly relied on at the Bar
 by the counsel for the clerk as showing that the regulation was
 in its essence unreasonable, and while admitting that he was
 bound to attend the audit and produce his books and give the
 auditor such explanations of the entries and vouchers as he
 required, it was contended that the duty of preparation of
 returns and the “calling back accounts, vouchers, and other
 documents” could not be imposed under the authority to “make
 the regulations” conferred on the Local Government Board by
 the Local Government Acts.

Consequent on the clerk’s refusal to comply with the auditor’s
 requirement to assist him by “calling back,” a correspondence
 between the clerk and the Local Government Board took place
 which had no effect on the situation, and to which I need not
 refer. Suffice it to say that the joint committee supported the
 clerk in the attitude he assumed; that the Local Government Board
 made the general regulation of the 5th February, 1915, the
 validity of which is now challenged; that proceedings at the
 criminal side were taken against Mr. M’Loughlin under sects. 14
 and 15 of the Local Government Act, 1871; that an indictment
 against him was found at the summer assizes, 1915, but on the case
 coming on for trial the prosecution was not, under the circum-
 stances detailed in the clerk’s affidavit, further proceeded with.
 The Local Government Board subsequently nominated another
 auditor—Mr. Cosgrave—and the clerk and the joint committee
 not receding from the position they had assumed, the Local
 Government Board and Mr. Cosgrave, their new auditor, obtained
 the conditional order for a mandamus now in question.

From this epitome of the history of the present controversy it will be observed that the only specific act which as a matter of fact the clerk has been called upon and has refused to do, is the comparison, or, as it is styled, the "calling back," of entries. The clerk was, no doubt, required, if necessary, to give all the assistance set forth in the order of the 5th February, 1915. He declined to recognize the order at all; but there is no suggestion of his having been called on or of his refusal to do any specific act connected with the audit except the "calling back." The 13th paragraph of his affidavit supplies an illustration of the character of the demand made on him by the auditor. He says: "I attended, when requested by him so to do, to give any explanation in accordance with the understanding come to at Clonmel Assizes, and gave explanations which he deemed satisfactory. On his requesting me, however, to call off from the admission-book the names of patients for the purpose of checking with the morning-statement book, I declined to do this, as the entries were made by myself in both these books," &c. There is no dispute whatever about the clerk's action, which appears to have been open and above board. He says he is prepared to give all reasonable explanations of the items contained in the books kept by him, and information generally; but he formally submits that the order of the 5th February, 1915, is ultra vires and void and that he does not fill the office of accounting officer, or clerk, or chief clerk to the joint committee, but merely that of book-keeper, and that the resident medical superintendent, and he alone, is the secretary or clerk of the asylum committee. He thus raises the two questions which have been discussed before us, namely:—(1) whether he is the clerk of the asylum committee contemplated by the order of 5th February, 1915; and (2) the validity of that order.

The order of the 5th February, 1915, purports to be made under the authority of the Local Government Acts, 1898 to 1902; but the specific authority claimed for it is the Local Government Act of 1902 (2 Ed. 7, c. 38), sect. 22. It purports to revoke articles 31 and 110 of the Public Bodies Order, 1904, and to substitute new articles in their place with the like numbering. The two articles of 1904 are repeated, but with an additional sub-article added to each. The original article, No. 31, dealt with

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K. B. Div. the council, and provided for the attendance at the audit of "the
 1916. secretary or clerk and the officers of the council, who by law are
 REX liable to account to the auditor," and the submission to him of all
 (L. G. B. & books and accounts. The new sub-article (article 31 (2))
 COSGRAVE) provides that the secretary or clerk is to render to the auditor all
 v. such assistance during the course of the audit as the auditor may
 M'Loughlin. require, whether by preparing returns, producing documents,
 Kenny J. calling back accounts, vouchers, or other documents, or otherwise
 as to the auditor may seem requisite for facilitating or expediting
 the audit. The original article, No. 110, dealt with the prepara-
 tion of the asylum accounts and the superintendent's half-yearly
 statements, and the new sub-article (110 (2)) is identical with
 the new sub-article to article 31, with the exception that it
 designates the person who is to attend the audit and render
 assistance to the auditor as "the clerk or chief clerk of the asylum
 committee."

As I have said, the specific authority claimed for the making of these new articles is the Local Government Act, 1902, sect. 22, which confers powers on the Local Government Board to make general regulations for the audit of the accounts of public bodies and their officers, and goes on to enact as follows:—

"The regulations may prescribe the form in which the accounts are to be kept, the mode of publishing the time and place for holding the audit, the person by whom and the time within which the accounts are to be produced for audit, and the mode of conducting the audit." The Local Government Board contend that Mr. M'Loughlin occupies the position of clerk or chief clerk of the asylum committee within the words of sub-article 110 (2), and that the directions as to the nature of the assistance to be rendered to the auditor are warranted by the power conferred on the Board to make regulations prescribing "the mode of conducting the audit."

As to the first question, namely, the position of Mr. M'Loughlin, it is admitted by the Attorney-General that he is not the "secretary or clerk" referred to in the new article 31 (2). Is he, then, the clerk of the asylum committee, mentioned in article 110 (2)? It is plain that the two new articles draw a distinction between the officer named in article 31 (2) and the one named in article 110 (2).

The former is referred to as "secretary or clerk," and appears to be the officer of any county or district council. (See the definition in article 2 of the Public Bodies Order, 1904, and the heading to Part I of that order.) On the other hand, article 110 of the order of the 5th February, 1915, is included in Part VI of the order of 1904 under the heading "Lunatic Asylum Committees," and it is clear to me that the new rules certainly intended to draw a distinction between the two sets of officers. If not, why should there be a repetition in article 110 (2) of the direction as to rendering assistance if article 31 (2) was adequate for the purpose? "Secretary" and "clerk" are defined in article 2 of the Public Bodies Order, 1904, as including any person who performs duties under a public body therein directed to be performed by a secretary or clerk; and article 3 (b) empowers the Local Government Board from time to time to assent to any departure from these rules. It is contended that a letter of the Local Government Board, dated 12th March, 1906, addressed to the resident medical superintendent of the asylum amounts to such an authorized departure. The letter—which is one from the secretary of the Local Government Board—states that the Board thereby, until further notice, assent, under article 3, to a departure from the terms of the Public Bodies Order in certain particulars, including with regard to lunatic asylums the office and duties of the medical superintendent, and that the order and forms are to be read so that the words "secretary or clerk" are to mean the medical superintendent, who is to be responsible for the entire management of the institution. The letter goes on to say that it rests with him therefore to require books and documents to be prepared, verified, and kept by specified subordinate officers subject to his supervision and control.

Mr. M'Loughlin, as I have already stated, was appointed to his present position on 10th April, 1900. The advertisement, in response to which he became a candidate, stated that the committee would receive applications for the position of clerk at a salary of £150 a year, and that the person appointed must have a thorough knowledge of book-keeping, and must give security to the extent of £200. The appointment was made by the county council, acting through the joint committee, pursuant to sect. 9, sub-s. 5, and

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K. B. Duv. sect. 84 of the Local Government Act, 1898. Subsequently to his
 1916. appointment, general rules for the management of the asylum
 REX were settled, and were approved of by the Lords Justices on the
 (L. G. B. & 4th June, 1902, presumably under the powers contained in sect. 9,
 COSGRAVE) sub-s. 6, of the Local Government (Ireland) Act, 1898 (61 & 62
 v. Vict. c. 37). These rules, inter alia, make provision for the con-
 M'LOUGHLIN. ditions of service and duties of the various officers of the asylum,
 including the medical superintendent, the chaplains, the matron,
 the clerk, the store-keeper, &c. Rule 47 (2), and rules 74 to 82
 are concerned with the duties of the clerk, and one of the returns
 —No. 7—in the schedules annexed to the rules, is meant to be
 signed by him.

In these circumstances I entertain a very clear opinion that Mr. M'Loughlin, though under the control of the medical superintendent, on whom a very wide power of regulating duties is conferred by the asylum rule 48, occupies a position distinct from that of the latter. He was expressly appointed as "clerk," and there can be no question that up to the present he has performed the duties assigned to the "clerk" by the asylum regulations of 1902. One of those duties is the keeping of the register of admissions (see asylum rule 77), the comparison of which with the morning statement, led to the friction between him and the auditor; and I entertain no doubt that while the letter of the 12th March, 1906, is intended to make definite the terms "secretary" and "clerk," and to remove all doubt as to the responsibility of the medical superintendent, it left untouched the position and duties of the officer who was recognized as the "clerk" of the asylum. I therefore am of opinion that Mr. M'Loughlin is the "clerk" of the asylum committee who is specified in the new sub-article of article 110 of the 5th February, 1915.

If then he be the clerk of the asylum committee designated in that sub-article, is the latter a valid order? I have already referred to the language of the Local Government Act of 1902, and the General Order of the 5th February, 1915, purporting to have been made under the authority of that Act—and the question is, whether the Local Government Board have exceeded their powers in directing the clerk to afford to the auditor the particular

assistance specified in the order. It is contended that the effect of the order is to throw additional duties on the clerk which he was not obliged to perform, and that although the committee of the asylum might be able to impose such additional duties on their officer under sec. 84 of the Local Government Act, 1890, the Act of 1902 confers no such powers on the Local Government Board. Sect. 9 (5) of the Local Government Act, 1898, vests in the county councils the management of lunatic asylums, and under it the county council may appoint and remove the officers of the asylum. The 84th sect. gives to the county council, acting through their committee, the power of appointment of officers and enacts that every officer so appointed shall perform such duties as the council may assign to him. The county council rules of the 4th June, 1902, already mentioned, prescribe the duties of the officers—those of the clerk being set out in rules No. 47 (2) and Nos. 74 to 82. He is—inter alia—to keep the register of admissions discharges and deaths and the various account books, as may be prescribed, and he is, in conjunction with the storekeeper, to take stock under the direction of the committee and check the storekeeper's return, and be responsible for the storekeeper's books and accounts. Article 106 of the Public Bodies Order, 1904, also provides for the respective officers of the asylum committee keeping books,—and by article 31 the officers of the council who by law are liable to account to the auditor are to attend the audit and submit all books and accounts which they are respectively required to keep pursuant to this article or any other order of the Local Government Board or by the council, together with all documents and vouchers relating to such books and accounts. In my opinion these several orders constitute the clerk an accounting officer, bound to attend the audit of the asylum accounts. He himself has recognized that such is his position, inasmuch as he declares that he was and is “prepared to give all reasonable explanations of the items contained in the books kept by him, and information generally.” It is plain that all accounting at the audit is not confined to the medical superintendent, and that though he is generally responsible for the working and accounts of the asylum his subordinates may also, in certain cases, be liable to account. It is another and a wholly different question whether

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K. B. Div. the Local Government Board has power to call on an accounting officer to perform the duties specified in the impeached order, including the duty of "calling back" accounts. Is it an additional service that is now sought to be imposed, or is it a service that is inherent in the duty of accounting? If it be a new service, can the Local Government Board impose it?

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I have gone as carefully as I could through the Local Government Acts and the various orders and regulations that have been made since 1898, and I have come to the conclusion that, apart from the Act of 1902, the power of prescribing the duties of the asylum officers is by sect. 84, Local Government Act, 1898, vested in the county council, acting through their committee. I can find no authority for the suggestion that the Local Government Board has the power. If that be so, and the preparation of returns and "calling back" are new services, they could not, in the absence of such a power as that given by sect. 22 of the Act of 1902 (2 Edw. VII, c. 38) be imposed by any body but the county council acting through their committee.

In my opinion "calling back" is not an additional or new service, but one inherent in and part of the very act of accounting; but I find it quite impossible to say, in the absence of a concrete case, whether the preparation of returns falls into a like category. It is admitted that an accounting officer must give all reasonable explanation to the auditor of the items in his accounts and of entries in the books kept by him. In the particular case of comparing the admission book with the morning-statement book, the auditor might seek an explanation of every item in each of these books and ask for a reconciliation of items when a difficulty presented itself. He has wide powers of enforcing an explanation, and it seems to me to savour somewhat of an intention to obstruct the audit when an officer, while prepared to do all this, declines to call out the items in one book or document for comparison with a corresponding or equivalent entry in another.

But supposing this service, but for the Act of 1902, should be regarded as one not hitherto authorized, it seems to me that ample power for its imposition is given by that statute. It is desirable, perhaps, in the first place, to see how the new regulation of the 5th February, 1915, stands. It is a composite order dealing with

several specific matters such as the attendances at the audit, the preparation of returns for the auditor, the production of documents, and calling back accounts, vouchers, and other documents, or otherwise as to the said auditor may seem requisite for facilitating or expediting the said audit. It is contended that at least the concluding sentence, commencing with the words, "or otherwise," is certainly ultra vires as involving a delegation to the auditor to impose additional duties. I offer no opinion as to the validity of this portion of the regulation, inasmuch as I am of opinion that the matters enumerated in the regulation are severable, and that this portion must be considered on its own merits whenever any question of its validity arises. The same observation I consider to be applicable to the other matters dealt with by the regulation, and if the latter be capable of being divided, one part may be rejected as bad, while the rest may be held to be good: see *Odessa Tramways Co. v. Mendel* (1), and the judgment of Lindley L.J. in *Strickland v. Hayes* (2). I consider that there is no difficulty in dividing this regulation into its several parts, and that, under the circumstances of this case, we ought to consider the validity of one part, and one part alone—namely, that relating to "calling back."

Is the imposition of that duty by the regulation justified by sect. 22 of the Act of 1902? The words of the latter are extremely wide. It deals with all accounting officers of public bodies, and authorizes a regulation prescribing "the mode of conducting the audit." The audit is not confined to the work of the auditor sitting alone in his room. It must contemplate the attendance on the auditor of the accounting officer, and the furnishing of explanations, and of materials for enabling the auditor to arrive at a just conclusion as to allowance, disallowance, or surcharge of items. The word "mode" is interpreted in the Oxford Dictionary as meaning a "way or manner in which something is done or takes place—a method of procedure in any activity, business," &c. It may be said that this meaning of the word does not extend the sense in which it is commonly used, and that "mode," "manner," and "method" all have the one meaning. But the point which I regard as important is that the expression is not applied to the

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(1) L. R. 8 Ch. D. 235.

(2) [1896] 1 Q. B., at p. 292.

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 1916. officers, includes them, and should be taken as imposing the
 REX obligation on the latter of assisting the audit by joining in the
 (L. G. B. & process of comparison styled "calling back." I, therefore, am of
 COSGRAVE) opinion that the Local Government Board regulation of 5th
 v. February, 1915, is not ultra vires in this particular, and I do not
 M'LOUGHLIN. think that any of the objections urged against its validity, on the
 Kenny J. ground that it is not reasonable, are sustainable.

I have only to add that in the view I take the conditional order in this case is too wide, and ought to be amended by confining it to the particular point in controversy—namely, "calling back."

GIBSON J.:—

The controversy in this case has arisen from the defendant refusing to perform the operation described as "calling back." The Asylum committee and defendant dispute the validity of the entire of article 110, sub-s. 2, of the general order of February 5th, 1915. The obligation of the defendant as officer to attend the audit and produce the necessary books, accounts, and vouchers in his custody was not and is not questioned.

The dispute relates to two points:—1. Was the defendant "the clerk" referred to in article 110, sub-s. 2? 2. Was the article ultra vires? It was not contended that if the defendant was "the clerk," and if the article was valid, the duty was not one which might be enforced by mandamus, though the article comprises a number of recurring specific acts which individually it might be difficult to compel performance of by the prerogative writ: *Attorney-General v. Staffordshire County Council* (1). The defendant, however, repudiated the entire article, and I shall assume, for the purpose of my judgment (without deciding), that mandamus would be an appropriate remedy.

There is no evidence that any other official in the asylum answered to the description of "clerk" in the ordinary sense of that term. The contention for the defendant is that under the official letter of March 12th, 1906, there was "a departure" from the General Order of 1904 validly made under article 3 (b) of that order,

(1) [1905] 1 Ch. 336.

and that the word "clerk" in that order was thenceforward to be read as meaning the resident medical superintendent. The sufficiency and effect of this letter and the validity of article 3 (b) were not questioned by the Attorney-General; and the notice of audit was given to the resident medical superintendent on that footing. The point relied on is that in article 110, sub-s. 2, of February 5th, 1915, "the clerk" was intended to describe, and does describe, the person occupying the defendant's post.

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In discussing this first point, the status of the defendant, I put aside the Asylum Accounts Order made by the inspectors, who had no power (at least after sect. 9, sub-s. 5, of the Act of 1898) to make any order. The relevant documents relating to this branch of the case are:—1, the resolution of the committee appointing the defendant clerk at £230 a year, pursuant to advertisement for a clerk; 2, the general rules for the government of the Clonmel District Lunatic Asylum of June, 1902, which were presumably signed by Lord Ashbourne and Lord Justice FitzGibbon, as representing the Lord Lieutenant, under the Local Government Act, 1898, sect. 9, sub-s. 6; 3, the general order, December 17th, 1904; 4, the letter of March 12th, 1906; 5, the order of February 5th, 1915.

The defendant was unquestionably appointed as clerk under sect. 84, sub-s. 1 (b), of the Local Government Act; there is no other official who is shown to fill that position. The rules of 1902 distinguish the duties of medical superintendent and clerk; rules 31 to 48 (both inclusive) relate to the former. He is to supervise all officers under rule 35. Rule 41 makes him responsible for the manner in which the various duties of the clerk and storekeeper are performed, and for seeing that the books and accounts are regularly kept, and that the correspondence under his supervision is carefully carried on. Rule 47 refers specifically to the duty of the clerk as to filling the register of admissions. Rules 74 to 82 (both inclusive) prescribe the particular duties of the clerk. The validity of these rules (subject to the possible operation of the order of 1904 and the letter of March 12th, 1906) was not impeached. These rules, under sect. 9 and sect. 84 of the statute of 1898, would seem to be taken out of the jurisdiction of the Local Government Board to displace.

K. B. Dir. The order of December 17th, 1904, defines, in article 2, the
 1916. expressions "secretary" and "clerk" as including (not as mean-
 ing) any person, by whatever name called, who performs, or may
 (L. G. B. & be required to perform, under or by direction of the public body,
 COSGRAVE) any duty "herein" directed to be performed by a secretary or
 v. clerk. Articles 5 to 24 (both inclusive) describe the respective
 M'LOUGHLIN. duties of the secretary and clerk. Articles 25 to 39 (both in-
 Gibson J. clusive) relate to the duties of secretary or clerk in relation to
 audit. None of the above provisions directly applies to Lunatic
 Asylum committees, but article 103, subject as therein men-
 tioned, makes them apply, with the necessary modifications, to
 the Asylum committee. There is no reference to the Rules of
 1902, made by a different rule-making authority. The Articles
 from 103 to 110 do not repeat the expression "clerk," but
 Article 106 prescribes the general duties of all asylum officers.
 Up to this I am of opinion that the defendant was the clerk to
 whom the duties imposed by articles 25 to 39 (as to audit)
 applied.

The letter of March 12, 1906, substantially reproduces the
 duty of the medical superintendent as described in Rule 41 of
 the Rules of 1902, but it professes to alter the definition of
 "secretary" or "clerk" in the order of 1904, and makes the
 Medical Superintendent to be the clerk in the order. The letter
 does not purport to be sealed or to be an order.

It was, I presume, treated as a "departure" under article 3 (b)
 of the code of 1904, which does not specify sealing or official
 signature as a requisite. I doubt whether (a) the Local Govern-
 ment Board (whose official action must be authenticated as the
 statute of 1898 (61 & 62 Vict. c. 37, sect. 102) requires) could
 reserve to itself a power of repealing an essential part of an
 order by a direction not itself an order; (b) whether the change
 made in the meaning of "clerk" could properly be described as
 "a departure"; the alteration is fundamental. There is the
 further difficulty whether, if the defendant was in fact clerk and
 performed clerk's duties, the Local Government Board would be
 able by designating the medical officer by the name of clerk to
 impose on him the duties of clerk in relation to audit. Does
 the Act of 1902 with the previous legislation authorize such a

transposition? I offer no final opinion on the point. The Attorney-General raised no question as to the effect of the letter and of the Order of 1904. The Order of 1915 makes two changes. It substitutes for article 31 of the Order of 1904 a new article imposing on the secretary or clerk and accounting officers an enlarged duty, which, if the letter of March, 1906, was out of the way, would by virtue of Article 103 of the Order of 1904 have extended to the defendant. Is the medical superintendent now by virtue of the letter, if in force, the clerk under this new Article 31? Is he the person to receive notice of audit?

The question before us depends on Article 110, sub-s. 2, which is confined to the clerk or chief clerk of the Asylum committee, on whom it imposes duties identical with those described in article 31, sub-s. 2. The repetition can only be accounted for on the assumption that "clerk" here is different from the clerk in Article 31, and is the Asylum clerk proper—as a designated person—not within the loose definition of Article 2 of the Order of 1904, or within Article 103. Is the letter of 1906 applicable to this clerk? It was probably not so intended; but it is unfortunate that the question was not settled by a definition or by express reference excluding the letter. The defendant would appear to be the clerk; but in my view it is unnecessary to decide the point if the article was *ultra vires*—a question which I now proceed to consider. Article 31, sub-s. 2, and article 110, sub-s. 2, are to the same effect, so the matter is of much general importance.

In no Act, order, or rules relative to audit previous to the Order of 1915 was there such a discretionary authority given to the auditor. The duties of the accounting officers are confined to books, accounts, and vouchers, which the auditor is to examine. It is no part of the contract of service proper to give the auditor help by reading out from books, &c., whether the officer has kept the account books himself, or they have been kept by anyone else. The question depends on two matters—(a) the effect of sect. 22 of the Act of 1902; (b) the construction of article 110, sub-s. 2.

The section authorizes regulations as to the form of accounts to be kept; the mode of publishing the time and place for holding

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K. B. Div. the audit; the person by whom, and the time within which,
 1916. the accounts are to be produced for audit, "and the mode of
 REX conducting the audit." This last phrase is found in the English
 (L. G. B. & District Auditors Act of 1879, c. 6, sect. 5. The expression
 COSGRAVE) "mode" occurs twice in the section. Unless "mode" authorizes
 v. the imposition of new duties in relation to audit not included in
 M'LOUGHLIN. the contract, and not imposed by any existing statute, the article
 Gibson J. would be beyond statutory authority. The specific enumeration
 of the matters to be the subject of regulations would indicate that
 "mode" must receive a limited meaning, as in the statute of
 1879. The grounds, of varying weight but all inter-connected,
 on which sect. 22 may be said not to justify the article impugned,
 may be placed under the following heads, which present the
 objections in different aspects:—

1. The auditor must examine all books, vouchers, &c., for himself, and use his own eyesight and faculties. The statutes and text-writers, such as Pixley (chapters ix, xv, xvi), and Encyclopædia of English Law, describe the nature of his responsibility, which cannot be shifted by delegation. If he employs assistants, as company auditors often do, he is liable for their breach of duty as principal or master. The only statute relative to auditors employing assistants that I have found is the Companies Consolidation Act, 1845, c. 16, sect. 108. With regard to accountants, see *Steele v. Sutton Gas Company* (1). Whether a Local Government auditor could get help in his audit at local expense is a matter on which I abstain from any opinion. If he can, would he be responsible for the assistants' work, as if they were his own employees?

2. If the auditor is to examine personally, it is objectionable that he should act on oral statements of the contents of books, vouchers, &c., which would be only hearsay or secondary evidence of such contents. Erasures or alterations in such documents might thus escape attention. Audit assumes personal direct responsibility and investigation.

3. Assuming that an auditor might get a clerk, hired by himself, to aid him by reading and examining books, &c., he

(1) 12 Q. B. D. 68.

would be answerable for such clerk as his servant; but the position of officials is quite different. They are not his servants. It is their accounts, business accuracy, &c., that are under investigation, and to accept what purports to be their reading out of books, vouchers, &c., as dispensing with the duty and necessity of the auditor's inspection would encourage dangerous laxity, and facilitate fraud, especially if there was a dishonest combination among the officials.

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4. The duty which the auditor is empowered by the article to require from the clerk represents the auditor's own proper work. The clerk in reading would be, for the time being, acting as the auditor's unpaid assistant in a way quite outside his rôle of book-keeper or accounting officer.

5. Neither by contract nor by any statute regulating audit up to 1902 was the clerk or accounting officer liable for the performance of any such service. His duties as to clerical work and as to audit were exactly defined. They do not include the kind of duty or aid provided for in article 110.

6. The only portion of sect. 22 of the Act of 1902 which could be invoked as authorizing the article is the clause at end:—"the mode of conducting the audit." The clause contemplates matters of detail and routine, practical arrangements as to the order of business, accounts, &c. It does not authorize the creation of new rights in the auditor, or new duties in the officials. The "mode of conducting" is to be within the circumscribed area of existing statutory functions, rights, and duties. It is essentially an administrative, ministerial provision.

There are many statutes in England as to audit collected in Pixley's work; in none is there anything to indicate an intention to vest in the auditor a right to exact such duties as article 110 (2) purports to create or to delegate part of the auditor's duty of examination to accounting officials. In some statutes there is a reference to "the mode" of the audit, *e.g.*, the District Auditors Act of 1879 (42 & 43 Vict. c. 6), sect. 5 (on which sect. 22 of our Act is founded); the Act 7 & 8 Vict. c. 101, sect. 49, directs the account to the auditor to be in such form and manner as may be prescribed; the Vestries Act, 1831, c. 60, sect. 34, in its marginal note refers to the "mode of audit"; the

K. B. Div. Sheriffs Act, 1887, c. 55, sect. 22, requires accounts to be examined and audited by such persons and in such manner as the Treasury may direct. In these enactments it seems to me clear that enlargement of duties beyond the limits of existing contract and statutory obligations is not contemplated. The chapters in Pixley on the functions and powers of auditors (ix, xv, xvi) are silent as to any such authority. No support for such a loose extension of the meaning of the word "mode" is afforded by dictionary or decision. Had it been intended to make such a material change in the position of auditor and officials, enabling, on the one hand, the former to devolve on the latter part of his own special function, and, on the other hand, compelling the latter to do work for the auditor without previously existing statutory obligation, the intention would have been expressed in clear language. Such intention cannot be collected from the use of the word "mode."

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But, however extended an effect be given to the term, article 110, sub-s. 2, would seem to go beyond it. The last clause, beginning "or otherwise," is far too wide. It purports to confer on the auditor an uncontrolled discretion, and makes his opinion as to what is requisite for facilitating or expediting the audit conclusive and binding. The conditional order is framed so as to embrace the duty described in article 110, sub-s. 2, as one and entire. Mr. Wylie, however, contends that the final clause is severable and that if the Court holds it *ultra vires* and the rest of the article valid, the conditional order can be amended; though such an amendment of the writ of *mandamus*, if actually issued, would be impossible. Adopting Mr. Wylie's proposition I would point out that though the clause can be detached and the conditional order amended, still the words form part of the section as a whole, and affect the preceding language, "Require" in the context seems to mean not what is *in fact* requisite, but what the auditor demands as being, in his opinion, requisite. The enumerated duties are all examples of what is included in the general term "assistance," and do not exhaust the assistance on which the auditor may insist. Though the specific objection raised by the defendant was confined to a particular act and a particular book, the article comprehends *all* books, *all* vouchers, *all* documents, including correspondence,} whether kept, entered, or

penned by the defendant or anyone else. I do not think that any such duty was within the power conferred by the statute of 1902.

If article 103 of the Public Bodies Order of 1904, not revoked by the Order of 1915, is in force, and the official letter of March, 1906, is valid and operative, and article 31 is read as describing the medical superintendent as clerk, and so the person to receive notice of audit—as my brother Kenny holds—the curious result would seem to follow that under article 31 Dr. Harvey would be “the clerk,” and under article 110 “the clerk” would be M'Loughlin, each being (in that view) the person to perform the same identical duty. Would the auditor be entitled to choose between them or to distribute the duty? A duet is hardly contemplated. I express no opinion as to the Order of 1915 on this point, which I have discussed in order to enable the Local Government Board to consider whether their legislation should not be re-cast and a homogeneous code substituted. I assume, for the purpose of my decision, that “the clerk” in article 110 designates such officer as the defendant, and that the duty therein described attaches to him, and no one else. My judgment is based on the article being in substance ultra vires and not warranted by sect. 22. The Irish statutes as to audit have no more extensive reach than the English legislation under which no such radical change in the powers of auditor and the duties of the accounting officials, such as the clerk, was authorized. “Mode of conducting the audit” describes the management of the business procedure in carrying out existing statutory directions and duties, and does not transform such powers and duties. The amendments in the Act of 1902 are strictly limited. Sect. 20 introduces an addition to the Irish code which makes our audit the same as that created by sects. 245 to 250 of the English Public Health Act of 1875. Sect. 22 has no greater effect than sect. 5 of the English statute of 1879 c. 6, which sect. 22 substantially reproduces. Nor does the duty arise on the contract of employment under the rules of 1902 or sect. 84 of the Act of 1898. The Asylum committee resolutely decline to accept such duties for their clerk. They are not before us, as they were not properly served, and the reference to them has been struck out of the conditional order.

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The mandamus must be refused, as neither by terms of employment nor by the statutes regulating his functions at audit is the defendant liable for the kind of service sought to be compelled.

CHERRY L.C.J. :—

I concur in the judgment of Gibson J., for substantially the same reasons as he has stated.

The matter in dispute between the auditor and the clerk of the joint committee is in reality a trivial one, but a point of principle of some importance may be involved, affecting both the Local Government Board and all asylum committees very seriously.

The auditor, in general terms, requires the attendance of the clerk of the joint committee at the audit, to render to him, during the course of the audit, all such assistance as he may require. A written requisition to this effect in the general terms of article 110 (2) of the Public Bodies Order, 1904, as amended by the General Order of the Local Government Board, dated the 5th February, 1915, was formally handed to the clerk by the auditor himself.

The particular duty which the auditor on this occasion required the clerk to perform was to read out from the admission register the entries he had himself made therein, so that the auditor might compare them with the admission warrants and the morning-statement book, and see if the entries made by the clerk in the register were correct.

While declining to discharge the particular duty sought to be cast upon him, the clerk at the same time stated that he was prepared to give all reasonable explanations of the items contained in the books kept by him, and general information for the purpose of the audit. His contention is that he cannot be called upon to assist in conducting the audit: to act as clerk or assistant to the auditor, as he contends he is required to do by the written requisition.

There is no doubt that the 110th article of the Public Bodies Order, 1904, as amended by the order of 5th February, 1915, does impose upon the clerk the duty which he has refused to perform, and any duty in connexion with the audit that the auditor may think right to impose upon him. He is bound to "render to the

said auditor all such assistance during the course of the audit as he, the said auditor, may from time to time require." But the serious question arises whether the Local Government Board can impose such extensive duties on an official who is not their servant. It is clear that they cannot do so without statutory authority; and the only statute of which I am aware which can be relied upon as conferring such authority is the Local Government Act, 1902 (2 Ed. 7, c. 38).

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The 22nd section of that Act enables the Local Government Board to make general regulations as to the audit of the accounts of public bodies and their officers, but it does not, as I read the section, enable these regulations to require that officers or servants of such bodies should assist in the actual work of the audit. That must, I think, be done entirely by the officials of the Local Government Board or by assistants of the auditor. The Attorney-General relied upon the concluding words of sub-sect. 1 of the section, "and the mode of conducting the audit," as enabling the Local Government Board by these regulations to impose such duties upon the officials of public bodies. But I cannot at all agree with him that such an interpretation can be put upon these words. To impose new duties of an onerous character upon public officials in such a vague way, would, I think, be extremely unfair, and I cannot assume that Parliament enabled it to be done.

For these reasons I am of opinion that the order of the Local Government Board, dated the 5th February, 1915, in so far as it imposes upon officials of the lunatic asylum the duties which the defendant in this case has refused to perform, is ultra vires, and cannot be enforced.

Having come to this conclusion, it is not necessary for me to express any opinion upon the other question which was argued before us, namely, whether the defendant in this case is the official designated in article 110, sub-s. 2, of the Public Bodies Order, 1904, as amended by the order of 5th February, 1915. In any event the application for a writ of mandamus must be refused.

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The prosecutors appealed (1).

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The Right Hon. the Attorney-General (Campbell K.C.) and Wylie K.C. (with them Sealy), for the appellants:—

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We submit that the respondent fulfils the office of clerk as defined in article 2 (*d*) of the Public Bodies Order, 1904. Part I of the Order, applicable to county councils, county urban councils, and district councils, is, by Part VI, article 103, applied, with the necessary modifications, to lunatic asylum committees. Moreover, the defendant was appointed *eo nomine* as clerk of the joint committee of management in 1900. In these circumstances the clerk, and not the resident medical superintendent, is the proper accounting officer.

The amending Public Bodies Order, dated 5th February, 1915, is impeached on the ground that it is *ultra vires*. Under sect. 108 of the Local Government Board (Ireland) Act, 1898, and sect. 22, sub-s. 1, of the Local Government (Ireland) Act, 1902, the Local Government Board had ample jurisdiction to make the Order, or any order reasonably necessary for the purpose of audit (2). The Board may make general regulations prescribing, among other things, "the mode of conducting the audit." Article 110 (2) of the amending order merely prescribes the mode in which the audit shall be conducted. The auditor is empowered by sect. 14 of the Local Government (Ireland) Act, 1871, to ask for explanations, and if he is entitled to explanations from those holding or accountable for the books, &c., he is entitled to assistance from them in the conduct of the audit. The duty of "calling back" accounts may be imposed by the Local Government Board on accounting officers under the words "the mode of conducting the audit." Apart from sect. 22 of the Local Govern-

(1) In the Court of Appeal, before SIR IGNATIUS J. O'BRIEN L.C., and RONAN and MOLONY L.JJ.

(2) Section 22 of the Local Government (Ireland) Act, 1902 (2 Ed. 7, c. 38), enacts:—"The Local Government Board may make general regulations for the audit of the accounts of public bodies and their officers, and the regulations may prescribe the form in which the accounts are to be kept, the mode of publishing the time and place for holding the audit, the person by whom, and the time within which, the accounts are to be produced for audit, and the mode of conducting the audit."

ment (Ireland) Act, 1902, it appears clear from sect. 86 of the Local Government (Ireland) Act, 1898 (61 & 62 Vict. c. 37), that the Board had power by their orders and rules to require officers paid out of the poor rate, or any other local rate, to perform duties. If the decision of the Court below is right, this section is inoperative. [They also referred to sect. 9, sub-ss. 2 and 7, and sect. 115, sub-s. 18, of the Local Government (Ireland) Act, 1898.]

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Article 19 (2) of the Application of Enactments Order, 1898, provides that the accounts of all the receipts and payments of every county and district council, and their committees and officers, shall be audited by an auditor of poor law unions, and sects. 11 to 18 of the Local Government (Ireland) Act, 1871, are incorporated, as amended by sect. 6 of the Local Government (Ireland) Act, 1872.

In case the Court should consider the terms of the conditional order too wide, we are willing that it should be so limited as to call upon the clerk to render to the auditor such assistance as the latter may from time to time require by "calling back" accounts.

Clancy K.C. and *Muldoon K.C.* (with them *Kinahan*), for the respondent:—

Mr. M'Loughlin was not "secretary or clerk" within the meaning of the Public Bodies Order, 1904, or the amending order dated 5th February, 1915. The Local Government Board for Ireland had themselves in the letter of the 12th March, 1906, interpreted these words to refer to the resident medical superintendent under the definition of the words in Article 2 (d) of the 1904 Order, and it is submitted that this view was correct, apart from any question of assent to any departure from the rules and regulations contained in the Order of 1904. The forms in the Order of 1904 make this clear. Those referring to all public bodies, such as, for example, 4, 9, 10, 11, 12, 13, and those confined to lunatic asylums specifically, 67 to 69 inclusive, strengthen this contention.

The Order of February, 1915, did not alter the definition of clerk. The articles in the orders when read with the forms, and

Appeal. having regard to the definition of "secretary or clerk" confirm
 1916. this view. The respondent was not an accounting officer, and had
 not the custody or control of the books, and was not obliged under
 any statute or order even to appear or attend at any audit. The
 accounting officer is the resident medical superintendent.

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The Public Bodies Order, 1915, is *ultra vires*. The statute relied upon to give it validity—the Local Government (Ireland) Act, 1902, sect. 22, empowering the Local Government Board to make general regulations for the audit of the accounts, &c., and the "mode of conducting the audit"—does not enable the Board to impose duties without remuneration upon local officials whose duties were to be assigned by another authority: see sects. 9 (6) and 84 (1) (b) of the Local Government (Ireland) Act, 1898. Sect. 22 confers no greater authority upon the Irish Local Government Board than what was conferred on the English central authority by sect. 5 of the District Auditors Act, 1879. The regulations made in England under that Act do not confer upon auditors such powers as are sought here by the Local Government Board.

Gibson J. has accurately stated the effect of the words "mode of conducting the audit." We rely also upon the general rules for the government of the Clonmel District Lunatic Asylum under the sections of the Local Government Act above mentioned. Regulations drawn up under statutory authority should be strictly confined to the powers conferred, and should be precise and clear as to what was required, as disobedience was a criminal offence: *The Queen v. Walker* (1); *Willingale v. Norris* (2). The Order of 1915 went entirely beyond the powers conferred, and in effect delegated the power to the auditor himself which was wholly unauthorized.

The system of audit, which involved the rendering of assistance by the officials concerned in the audit, was wrong in principle and open to abuse and the commission of fraud. The auditor must himself examine and compare accounts, vouchers and papers. The Local Government Board in their letter of the 9th of February, 1914, addressed to the Chairman of the Joint Committee admit this,

(1) L. R. 10 Q. B. 355.

(2) [1909] 1 K. B. 57.

and confirm the same view in their letter of the 9th of March addressed to the resident medical superintendent.

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The conditional order in any view could not be made absolute. The Court could only order the performance of some specific duty laid down in a statute in an order lawfully made under it, and the process of calling back demanded here is neither clear nor intelligible. The phrase is not mentioned in Pixley, nor in any statute or order prior to that of 1915 relating to the function of auditing the accounts of local bodies.

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Wylie K.C., in reply.

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In this case the Local Government Board and one of their auditors have appealed from an order of the King's Bench Division, discharging a conditional order of the 17th of February last, by which a writ of mandamus was directed to be issued against Mr. J. M'Loughlin, clerk to the joint committee of the Clonmel District Lunatic Asylum, commanding him, in pursuance of the Public Bodies (Ireland) Order, 1915, to attend at the adjourned or any future audit of the accounts of the joint committee, and to render to the auditor for the time being all assistance during the course of the audit as "the auditor may from time to time require, whether by preparing returns, producing documents, calling back accounts, vouchers, or other documents, or otherwise as to the said auditor may seem requisite for facilitating or expediting the said audit." The conditional order is, in its terms, identical with the provisions of the general order made by the Local Government Board on the 5th February, 1915.

The main question in dispute between the Local Government Board, on the one hand, and Mr. M'Loughlin, supported by the joint committee of the asylum, on the other, is whether this General Order is *ultra vires*. In the Court below, Gibson J. and Cherry L.C.J. were of opinion that article 110 (2) of the Order was absolutely *ultra vires*. In this Court we were asked by the Attorney-General and Mr. Wylie to frame a new writ of mandamus which, instead of requiring compliance with the whole

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of article 110 (2), would command Mr. M'Loughlin to attend at the adjourned or any future audit, and render such assistance as the auditor may require in calling back accounts. So framed, the order for mandamus would not, in my opinion, be more sustainable than the form of conditional order originally made by the King's Bench. We do not know what the term "calling back" precisely means. It is not a term of art. It does not appear to be defined even loosely in any book on auditing. An order limited as suggested would, on account of its vagueness, be ineffective.

The history of the dispute is not unimportant. It appears that Mr. M'Loughlin, against whom no charge of incapacity or inattention to duty is alleged, was appointed clerk by the Asylum committee in 1900. For some years subsequently he attended the audits; and it was not until a gentleman named Mr. Considine came to audit the accounts that any friction occurred. Describing the practice which prevailed before the appointment of Mr. Considine, the respondent in his affidavit states:—"During the period which I have acted as clerk of Clonmel District Asylum the accounts have been audited by three auditors prior to the appointment of Mr. Considine in March, 1912. I have never been requested or requisitioned by any of these three auditors during a period of twelve years to call off the entries in the register of admissions for purposes of checking against the entries in the morning-statement book, nor was I requested by any of them to call back entries from the bills furnished by contractors for checking with the storekeeper's books." That statement is not contradicted, and I assume that the practice referred to by Mr. M'Loughlin had been the settled practice prior to Mr. Considine's appearance upon the scene. That practice, which appears to me to have been correct, ought to have been followed. However, Mr. Considine was of a different opinion; and he insisted that the clerk should go through this process, which in the affidavit of Mr. Cosgrave is described as "calling back."

We learn from the auditor that the particular duty which he requested the clerk to perform was "to read out from the admission register the entries he had himself made therein, so that I might compare them with the admission warrants and the morning-

statement book, and see if the entries made by the clerk in the register were correct." Mr. M'Loughlin's objection to perform this operation is stated very clearly in the following passage in his affidavit:—"I attended four half-yearly audits made by Mr. Considine, and had ample opportunity of observing his methods. I was particularly struck by the fact that under this arrangement for the calling back of bills for checking with the store books a storekeeper in collusion with the clerk could commit frauds with little risk of detection for a considerable period of years. A new auditor adopting a different method might or might not detect the fraud. Moreover, the clerk and storekeeper, in collusion with the contractor for, say, bacon, beef, or bread, could carry out very considerable frauds with practically no risk of detection. The average monthly payments for bacon, beef, and bread are respectively over £130, £160, and £300. The result would be serious losses to the ratepayers." The clerk also stated that what he had been asked to do was tantamount to an invitation to him to review his own work—a violation of the first principles of auditing, and an opportunity to the unscrupulous for the committing of frauds. Not only did the Asylum committee support the attitude taken up by Mr. M'Loughlin, but they passed two strongly worded resolutions protesting against the view held by Mr. Considine and the Local Government Board as to the manner in which the audit should be conducted.

What happened next shows how scrupulously careful public departments ought to be in framing orders, the breach of which may entail punishment either by fine or imprisonment. When Mr. Considine, supported by the Local Government Board, insisted upon his method of conducting the audit, the General Order of 1915 was not in force; the audit was then regulated partly by the general provisions of the Local Government (Ireland) Act, 1871, and partly by the Public Bodies (Ireland) Order, 1904. For refusing to attend the audit and take part in auditing his own accounts—a proceeding which the Asylum committee, and, in my opinion, rightly, considered undesirable—Mr. M'Loughlin was prosecuted. It is unnecessary to refer in detail to what took place at the Clonmel Assizes, when the case was, as had been thought, "amicably terminated." The parties do not, however,

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agree as to the exact terms then arranged. Apparently Mr. Considine and the Local Government Board were under the impression that Mr. M'Loughlin had agreed to call over bills, &c., at the audits in future, while, on the other hand, the respondent thought that both the auditor and the Board had abandoned the attitude assumed by them prior to the prosecution.

Feeling, however, that there was, under the then existing statutes and order, a difficulty in enforcing their view, the Local Government Board made the General Order of the 5th February, 1915. Then, with the perfectly reasonable object of testing the position taken up by Mr. M'Loughlin and the Asylum committee, they appointed another gentleman, Mr. Cosgrave, to audit the accounts. Mr. Cosgrave, who does not appear to have had any unpleasant differences with Mr. M'Loughlin, was directed by the Local Government Board to take a certain course, and he proceeded, firmly and politely, to carry out his instructions. In his affidavit he says:—"I proposed to make a start by checking the admissions, and for that purpose I asked the clerk to call off the entries in the register of admissions that I might check the names, dates, and other particulars in the admission warrants against the entries in the morning-statement book. This the clerk declined to do, and said that he did not recognize the Public Bodies Order, 1915. I then informed the clerk that I requested him in the discharge of his duties as clerk to the said Asylum committee, and under the obligations cast upon him by the Public Bodies Order, 1915, to attend upon me at the audit, and to give me such assistance as I might require by the preparing of returns, producing documents, calling back accounts, vouchers, or other documents, to facilitate the audit as laid down in the aforementioned order. The clerk again refused." There is no doubt whatever that what the clerk was required to comply with was the whole of article 110 (2) of the Order of 1915, and not the comparatively small portion of it which relates to calling back accounts. The object, undoubtedly, was to test the validity of the order in its entirety. Mr. M'Loughlin persisted in his refusal to comply with the demand of the auditor. The Asylum committee still maintained their view with regard to the effect of the General Order of 1915, and the illegality which they attributed

to it, while the Local Government Board insisted that the committee were wrong in the conclusion they had formed, and unreasonable in their attitude. In the present case they have taken the more reasonable course of instituting civil not criminal proceedings, and accordingly we have now to determine which view was correct.

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I admit frankly that, when the case was opened, the importance of this process of "calling back" was not present to my mind; and I was rather struck with the suggestion made by the Attorney-General, that the refusal of Mr. M'Loughlin to give the assistance required was unreasonable and merely calculated to extend the time occupied in the audit, to embarrass the auditor, and to prevent what the law required, namely, the judicious and proper examination of the accounts of the asylum. But as the case proceeded, and especially after the able and lucid arguments of Mr. Clancy and Mr. Muldoon, I was satisfied that behind the apparently small question of calling back there was an issue of very vital importance relating to the conduct of audits, and that it could not be disposed of in the manner suggested by counsel for the Local Government Board. I am just as strongly of the opinion now as I was at the opening of the case that there must be of necessity a certain amount of mutual accommodation between the auditor and the officers whose accounts are being audited, or the officers who may, having regard to the provisions of the Local Government Act, 1871, be required to attend the audit. It would be utterly impossible to carry on the business of these local bodies unless there was on the part of all parties good feeling and good temper, and a mutual desire to assist at and facilitate the audit. It must be remembered at the same time that the auditor, whose duty it is to check the work of another officer or body, ought to discharge that function, not exactly in a hostile manner, not with undue or unreasonable suspicion, but with great care and accuracy, and as an independent investigator. The audit is his work; it is not to be conducted conjointly by him and the officer whose accounts are under audit. It is wholly the task of the auditor, and he cannot call upon the officer whose accounts are being audited to assist him in any process comprised

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(L. G. B. & COSGRAVE) The powers and duties of an auditor are regulated mainly by
v. the Local Government (Ireland) Act, 1871, sect. 14 of which
M'LOUGHLIN. provides that : " For the purpose of any audit of accounts under
this Act every auditor may, by summons in writing, require the
Sir Ignatius J. production before him of all books, deeds, contracts, accounts,
O'Brien C. vouchers, and all other documents and papers which he may deem
necessary, and may require any person holding or accountable
for any such books, deeds, contracts, accounts, vouchers, docu-
ments, or papers, to appear before him at any such audit, or any
adjournment thereof, and if thereunto required by such auditor to
verify on oath or affirmation (which oath or affirmation every
auditor is hereby authorized to administer or take) the truth of
all such accounts and statements from time to time respectively,
or subscribe a declaration as to the correctness of the same." This
section enabling the auditor to demand a verification of accounts
upon oath was intended as a foundation for sect. 15. The latter
section provides that : " If any person, upon any examination under
the authority of this Act, shall wilfully give false evidence, or
wilfully make or subscribe a false declaration, he shall, on being
convicted thereof, suffer the pains and penalties of perjury ; and
if any person shall refuse or wilfully neglect to attend in obedience
to any summons of any auditor, or to give evidence, or shall wilfully
alter, suppress, conceal, destroy, or refuse to produce any books,
deeds, contracts, accounts, vouchers, documents or papers, or copies
of the same which may be required to be produced for the purposes
of this Act to any auditor authorized by this Act to require the
production thereof, every person so offending shall be deemed guilty
of a misdemeanour." It is perfectly manifest that sects. 14 and 15
were designed for the purpose of compelling an accounting officer to
produce the books and documents which would substantiate his accounts,
if true ; and that the object of empowering the auditor to require a
verification of the accounts upon oath was to secure that the officer
could be punished as for perjury if the account was false. There has
been, I think, some slight misconception as to the powers of an auditor
in regard to the administration of an oath under this

Act. If during the course of the audit he thinks it necessary, the auditor may call upon the accounting officer to verify his accounts upon oath; the auditor is not empowered, as appears to have been assumed by the Local Government Board, in the case of an audit of this kind to command in the first instance a sworn inquiry into the accounts, summoning before him those who are accounting parties, or such other officers as may within the terms of sect. 14 be bound to attend to be examined on oath touching the accounts. Of course the practical result in many cases may be that the audit does assume the form of a sworn inquiry.

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To my mind the construction of sects. 14 and 15 is perfectly clear. It may be that, in addition to accounting officers, properly so called, other persons such as those holding books, may be required by the auditor to attend. On this point I give no decision one way or the other. I am satisfied that the present proceedings taken against Mr. McLoughlin are misconceived, and that the General Order on which they are based was not in conformity with law; and holding that this general order was ultra vires, I have referred to sects. 14 and 15 of the Local Government Act, 1871, to see whether they might not afford some justification for the course taken by the auditor and the Local Government Board. I find no justification in these sections alone for the course taken by the prosecutors.

The next matter to be considered is the position of Mr. McLoughlin under the Rules made by the Asylum committee, with the approval of the Lord Lieutenant, regulating his functions and duties—it was not within the jurisdiction of the Local Government Board to make or suggest any regulations in this respect for the government of the Asylum: that jurisdiction is not given to them as it may be with regard to other bodies. The Lord Lieutenant is the sanctioning authority to rules made by the committee. From the General Rules for the government of the Clonmel District Lunatic Asylum it is manifest that Mr. McLoughlin, as clerk, is a mere subordinate officer under the resident medical superintendent. The duties for which the resident medical superintendent is responsible are very extensive. "He shall be careful that the prescribed books are kept with regularity, and that they are at all times ready for inspection; he

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 1916. the clerk and of the storekeeper are performed, shall see that the
 REX books and accounts are regularly kept, and that the correspond-
 (L. G. B. & CosGRAVE) ence conducted under his direction and supervision shall be
 v. carefully carried on; he shall be responsible for the lodgment and
 M'LOUGHLIN, disbursements of such public money as may be placed in his
 Sir Ignatius J. hands."
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The resident medical superintendent has the assistance of the clerk for the purpose of preparing the books and accounts mentioned in the general rules of the Asylum. Mr. M'Loughlin, however, is merely a clerk or assistant to the resident medical superintendent, who, under the general rules, is the person answerable for the expenditure of the Asylum and the proper keeping of books, vouchers, and accounts. In the words of rule 48, "The whole superintendence and government of the Asylum shall be in the hands of the medical superintendent, and he shall regulate the duties of other officers, attendants, and servants, so far as they are not provided for by the general rules and regulations of the committee." The clerk has not even the custody, except in a most restricted way, of any books or documents. The duties of the clerk are prescribed by rules 74 to 82 inclusive; and in rule 76 it is laid down that "During the specified hours the clerk shall attend and take charge, under the direction of the medical superintendent, of the various ledgers and books." Outside those specified hours the ledgers and books are technically in the charge and under the control of the resident medical superintendent; and even during the hours the clerk shall take charge he is still under the direction of the medical superintendent.

No doubt the clerk shall keep all accounts, examine receipts and vouchers, and see that the bills are in accordance with contract prices; he shall also keep the statutory register of admissions, discharges, &c., and the letter, or correspondence-book. But these books and accounts are the books and accounts of the medical superintendent, who, and not the clerk, is the accounting officer. If these rules be recast by the proper authority, a clerk may be made the accounting officer. I only deal with the rules now in force.

The only part of the judgment of Gibson J. with which I do

not find myself in agreement is that in which, having considered the various rules and orders, he says: "Up to this I am of opinion that the defendant was the clerk to whom the duties imposed by articles 25 to 39 (as to audit) applied." He, however, seemed to be of opinion that the letter of the Local Government Board of the 12th March, 1906, was a legal departure from the terms of the Public Bodies Order, 1904, and that, having regard to that departure, the medical superintendent was the accounting officer.

It may be convenient, at this stage, to deal with the letter of the 12th March, 1906, described as a departure from the terms of the Order of 1904. This letter makes certain useful alterations with regard to the keeping of ledger accounts; it requires that the resident medical superintendent shall sign all orders; it prescribes a new form of daybook; it alters the terms of article 108; it requires the Local Government Board to assent to the insertion of "at least once in each" instead of "each" half year in article 109 (1); and under the heading "generally" it says that "In the application of the Public Bodies Order to lunatic asylums the Local Government Board regard the words 'secretary or clerk' as meaning the resident medical superintendent." Gibson J. at first expressed doubt as to whether under article 3 (b), which authorizes a departure, the letter in question did effect a departure; but as the Attorney-General raised no question as to the effect of the letter, he was apparently of opinion that a departure had been made, and that the medical superintendent was put in the position of "secretary or clerk" within the meaning of the order of 1904. Although I do not differ from his ultimate conclusion, the means by which he arrived at it are not in accordance with my view. I am satisfied that on the true construction of the Public Bodies Order, 1904, the resident medical superintendent is the person bound to perform the duties under the heading "audit," prescribed by articles 25 to 39, in so far as these duties were imposed upon "the secretary or clerk."

It is necessary, as I differ slightly from that part of Gibson J.'s judgment to which I have just referred, to explain the foundation on which I base my view. It has been pointed out with perfect accuracy by counsel for the respondent that when the Local Government Board came to frame a General Order which would

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Appeal. apply to the different bodies whose accounts had to be audited, they had, in the first instance, to provide for county councils, county borough councils, and district councils. County councils have got an officer called a secretary, county boroughs and urban and rural district councils have got an officer called a clerk; and when the Board came to deal with bodies other than these councils, instead of defining by some other name the official who was to be the accounting officer whose accounts had to be audited, they proceeded to insert articles which would capture some officer of these other bodies who would not properly be described as secretary or clerk, and impose upon him the duties for which, in the case of county councils, county borough, urban and rural district councils, the "clerk or secretary" was made responsible.

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The expressions "secretary" and "clerk" are defined, to a certain extent, by article 2 (*d*), which reads:—"The expression 'secretary' and 'clerk' of a public body shall include any person, by whatever name called, who performs or may be required to perform, under or by direction of the public body, any duty or duties herein directed to be performed by a secretary or clerk." Gibson J. was of opinion that, putting aside the letter of 12th March, 1906, the duties imposed by articles 25 to 39, in relation to audit, were cast upon the Asylum official designated "clerk," and that accordingly he came within the definition in article 2 (*d*). There are other parts of the order which must be referred to in this connexion. Part VI provides:—"Subject to the provisions of this part of this Order, Part I of this Order shall apply, with the necessary modifications, to the committee of a lunatic asylum, appointed under section 9 of the Act." Part VI requires that the minute-book of the Asylum committee shall be kept and entered in such form as may from time to time be prescribed by the inspectors of lunatics; that the financial minutes shall be recorded "according to Form 67"; while article 110 provides for the use of forms 68 and 69, article 106 provides:—"It shall be the duty of the respective officers of every Asylum committee to keep and punctually enter up the several books and forms or parts of such books and forms in the manner set forth and according to the directions given in this order and in the schedule thereto." An examination of the forms given in the schedule shows that the

clerk of the asylum is not the "secretary or clerk" referred to in article 25 and subsequent articles. The general forms are divided into four classes, namely, those relating to—1, county councils, county borough and district councils; 2, Asylum committees; 3, committees of agriculture and technical instruction; 4, other public bodies. In addition, a number of forms in the earlier part of the schedule apply to "all public bodies."

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The forms appropriate to articles 25, 110 indicate plainly the person meant to be accounting officer in the case of lunatic asylums. Form 68, which relates to the abstract of accounts of the Asylum, contains the words "to be prepared by or under the supervision of the superintendent for submission to the auditor." According to the definition article the expression "superintendent" means the resident medical superintendent. It is the superintendent who signs the abstract of accounts and certifies it to be true. Form 69, headed "superintendent's statements," provides for a statement of cash assets and liabilities; also a statement of the loan accounts of the asylum for the half-year, and in a note it prescribes that:—"The figures required for the several columns of this table are to be accurately calculated by the superintendent each half-year. The claim made for repayment of principal and interest each half-year by a lender shall also be examined, and, if found correct, shall be so certified by the superintendent." This form further provides for a statement of names and salaries of the general officers, names, and superannuation allowances of retired officers, &c., and the nine columns, devoted to entries of these particulars, have "to be filled up by the superintendent." Although the forms applicable to articles 26 and 37 are not specially framed to fit Asylum committees, they are obviously intended to be addressed to the person whose accounts have to be audited; and in the present case the notice of audit given in form 9 was in fact addressed to the resident medical superintendent, and only to him.

Gibson J. was satisfied that if the letter of 12th March, 1906, was out of the case, Mr. M'Loughlin should be regarded as the "clerk or secretary" within the meaning of the Public Bodies Order, 1904. Here I differ from the learned judge's conclusion. The forms to which I have adverted establish, if it were not other-

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wise clear, that on the true construction of article 25 and subsequent articles the "secretary or clerk" who is to discharge the duties therein specified is not, so far as lunatic asylums are concerned, the clerk of the asylum committee but the resident medical superintendent.

Does the Local Government (Ireland) Act, 1902, sect. 22, alter the position to such an extent as to give jurisdiction to the Local Government Board to make a General Order of the wide scope of that made in 1915? [His lordship read section 22.] I need not deal at any length with the construction of sect. 22, because I adopt every word of Gibson J.'s observations upon that section.

I express no opinion as to what may be the powers of the Local Government Board if an entirely new code of asylum rules were made in virtue of which clerks of Asylums might become accounting officers. To say that this might not be done might create difficulties for both the Local Government Board and local authorities. I express no opinion, but I think their powers must be subject to, or, at any rate, cannot override, rules made under the sanction of the Lord Lieutenant.

Briefly stated, my reason for holding that, on the statutes as they stand and the General Order of 1904, the Order of 1915, article 110 (2), is bad and ultra vires are:—

1. It imposes upon the clerk duties which the auditor himself is bound to discharge. The audit, in my view, to quote the expression of Gibson J., should not be a duet between the auditor and the officer whose accounts are being audited, or any other person compellable to be present. It must be the audit of the auditor. If the persons whose accounts are under audit were to assist at the audit by taking part in the process termed "calling back" accounts, it might lead to grave error, and, if an official were disposed to be dishonest, result in serious loss to local bodies. The essential feature of every audit, whether of the accounts of a private company or of a public body, is that it shall be a searching, independent examination of the accounts, and that the auditor shall not be in a position to excuse any negligence of his which may occur by saying that it saved time to adopt an improper procedure. In fact, the Local Government Board do not seek to defend as a proper system that which they seek to enforce in this

case. In a letter of the 2nd March, 1914, to the Asylum committee they state:—"The auditor would have been careful not to ask the clerk to call out the quantities from the bills, had he entertained any suspicion that the clerk would attempt to act in such a manner; but he had quite sufficient confidence in Mr. M'Loughlin to warrant him in taking this risk." Audits conducted on this principle would not provide sufficiently against fraud, or afford a proper check for its detection. If this case has the effect of putting a stop in future to such a mode of procedure, the money which has been spent upon it will not have been wasted. If the auditor himself is unable to do all the work, he may, perhaps, be entitled to employ independent assistance at the expense of the local authority. However, this is not a matter for us now to decide.

2. It seeks to impose upon the clerk of the Asylum committee duties not prescribed for him by the rules regulating his employment. It seeks to compel him to discharge, without any increased remuneration, what might be very onerous duties not in connexion with his own asylum, but by way of assistance to the auditor. In effect the purport of the order is to turn the clerk into an assistant auditor in disregard of the wishes of his own employers, who have prescribed his duties in the manner provided by law.

3. Whatever may be the construction of sect. 22 of the Local Government (Ireland) Act, 1902, it gives no jurisdiction to the Local Government Board to delegate to their auditor the power to make regulations which it purports to confer upon them.

I decide nothing with regard to article 31 (2), which seems to be open to the same objections. It obviously deals with the officers of county councils, county boroughs, and urban and rural district councils. While expressing no definite opinion on article 31 (2), it seems to me that the principles applicable to 110 (2) would *prima facie* apply to it.

I am of opinion that the General Order of 5th February, 1915, article 110 (2), is absolutely bad, and incapable of being sustained, and that the order of the Court below should be affirmed.

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In this case I am of opinion that the decision of the Court below should be affirmed, for the reasons stated in the judgment of Gibson J. The case, however, has been so elaborately argued before us, that I think I am bound to deal with it more specifically, and I proceed to do so.

What is the ordinary meaning of the word “audit” in the English language? I find in the Century Dictionary it is:—(a) a noun; the meaning attached applicable to this case is stated thus: (2) “official examination and verification of accounts or claims, an examination into accounts or dealings with money or property, especially an examination of accounts by proper officers, or persons appointed for that purpose, who compare the charges with the vouchers, examine witnesses, and state the result”; (b) it is a verb transitive, “to make audit of, and examine and verify by reference to vouchers”; (c) a verb intransitive, “to examine into the correctness of an account, to act as an auditor.”

In the present case the audit is prescribed by article 19 of the Application of Enactments Order, 1898. According to sub-sect. 2 of this article, “the accounts . . . shall be audited by an auditor of Poor Law Unions.” It is plain on this that it is the “auditor” who is to “audit” the accounts, and I can see no reason for thinking that in article 19 the words “audit” (verb and noun) and “auditor” are not used in their ordinary sense. It is, therefore, the “auditor who is to examine the accounts,” and “compare the charges with the vouchers.”

If instead of one auditor *two* were appointed to “audit the accounts,” the simple and natural way would be for one to read out the account from the book, and the other to hold the vouchers, and as the first read out each item from the book, the other would read the voucher, and thus they would jointly compare the charges with the vouchers.” Can it be suggested that both were not doing the work of the “auditors” in the strictest sense of the words? The one is just as much an auditor as the other. It appears to me that it would make no difference in the real nature of the operation which of them read the book or which read the vouchers.

If the man with the book read out "payment £10," and the other said "voucher for £10, all right," either may have made a mistake. The payment may have been £20, or the voucher may have been £5, but that, in either case, this would have been a mistake of the auditors in making the audit appears to be beyond all possible doubt.

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It will be seen that the General Order of the 5th February, 1915, says, "calling back accounts, vouchers, or other documents." So that it clearly includes imposing on the clerk the duties of either of the two auditors in the case I have mentioned. The auditor may read the account book, and tell the clerk to read out the vouchers. This is the simplest case. The auditor reads out "payment £50." The clerk has a voucher for £20, and he reads it £50. This is called an audit! If the auditor compares the documents himself afterwards, the "calling back" is simply waste of time.

During the arguments it was assumed that the clerk should read the book, and the auditor check it by the vouchers. I put it to the Attorney-General as a *reductio ad absurdum*: suppose their positions were reversed and the clerk read the vouchers? I had not then noticed that the General Order included this very case. In such a case, which is the auditor, the man who has the book or the man who has the vouchers? It must be one or the other. The General Order provides that the clerk may be either, as the auditor directs. A more complete case of a joint audit by the auditor and the clerk it is impossible to conceive. The object of the operation is to ascertain the accuracy and truth of the payments in the book. The comparison of the book with the vouchers is the essence of the auditor's work. It is a slow process if carried out by one person.

As to the cryptic phrase "calling back accounts," counsel for the Local Government Board told us that he himself knew no more what it meant than we did, but that he was informed that it meant, and was understood by accountants to mean, that the clerk of the Asylum should read out the entries in the admission book while the auditor read the vouchers, which, in this case, were the admission warrants. This puts the clerk in the precise position of one of the two joint auditors in the case I have put. It converts the

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audit by the auditor into a joint audit by the auditor and the clerk. Further, the object of the operation is to ascertain the truth and accuracy of the entries in the book; and the person selected to see the book, and the only person, as far as I can make out, who examines it, is the very man who has made the entries in question.

In my opinion there was no power to delegate any part of the duties and functions of the auditor to an officer of the body whose accounts were being audited, and specially not to the very officer who kept and was responsible for the book under audit.

The language of the Legislature in directing audits varies in different cases. Instances of this will be found in:—The Companies' Clauses Act, 1845 (8 & 9 Vict. c. 16), sects. 106, 107, 108; the Commissioners' Clauses Act, 1847 (10 Vict. c. 16), sect. 93; the Joint Stock Companies Act, 1856 (19 & 20 Vict. c. 47), schedule, table B, articles 74-84; the Companies Act, 1862 (25 & 26 Vict. c. 89), schedule I, table A, articles 83-94; the Companies Act, 1879 (42 & 43 Vict. c. 76), sect. 7, sub-s. 5; the Companies (Consolidation) Act, 1908 (8 Ed. 7, c. 69), sect. 113; the Regulation of Railways Act, 1868 (31 & 32 Vict. c. 119), sect. 8.

Broadly speaking, the only duty cast upon companies by these Acts is to deliver half-yearly or yearly, as the case may be, copies of the balance sheet and accounts together with vouchers to the auditors. The latter may employ such accountants and other persons as they may think proper, at the expense of the company. Under section 93 of the Commissioners' Clauses Act, 1847, the auditors shall, in the presence of the clerk to the commissioners if he desire to be present, proceed to audit the accounts. That Act casts no duty of any sort upon the clerk; and he is not bound to be present. Under the Act of 1856 every auditor shall be supplied with a copy of the balance sheet, and it shall be his duty to examine the same, with the accounts and vouchers relating thereto. Every auditor shall have a list delivered to him of all books kept by the company, and he shall at all reasonable times have access to the books and accounts of the Company; "he may, at the expense of the company, employ accountants or other persons to assist him in investigating such accounts, and he may in relation to such account examine the directors or any other officer of the company." These provisions are reproduced in the Companies Act of 1862.

In the Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), a distinction is drawn between inspection and inquisition on the one hand and an audit on the other. Section 109 provides that the Board of Trade may appoint inspectors to investigate the affairs of any company; that it shall be the duty of all officers and agents of the company to produce to the inspectors all books and documents in their custody or power, and that an inspector "may examine on oath the officers and agents of the company in relation to its business, and may administer an oath accordingly." Section 112 makes it incumbent upon every company to appoint an auditor or auditors, and section 113 provides that every auditor shall have a right of access at all times to the books and accounts and vouchers of the company, and shall be entitled to require from the directors and officers of the company such information and explanation as may be necessary for the performance of the duties of the auditors." Where it was intended that powers of inquisition should be exercised, they are conferred expressly by the Act. As compared with these powers, the words of the sections in the Act of 1871 relating to audit are very limited.

Now, the General Order with which we have to deal in this case—1, imposes certain duties on the officers of the Asylum; 2, it requires the clerk or chief clerk of the Asylum to render to the auditor all such assistance during the course of the audit as he may require—whether by (a) preparing returns; (b) producing documents; (c) calling back accounts, vouchers, or other documents, or otherwise as to the said auditor may seem requisite for facilitating or expediting the audit. This means that the officer of the Asylum is to obey the orders of the auditor in respect of all these matters though, as appears in this case, the committee consider it undesirable that he should do what the auditor orders; and if the General Order is valid the officer would be bound to do so though expressly prohibited from doing so by the committee, and even probably if there was a rule of theirs approved by the Lord Lieutenant to the contrary.

It is therefore essential to see what was the position of the Local Government Board in relation to lunatic asylums and their officers prior to the Local Government Act of 1898, and what was the law as to the audit of their accounts prior to that date.

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 1916. c. 33. An Act passed in 1845 (8 & 9 Vict. c. 107) made further
 REX provision for the care of the lunatic poor.
 (L. G. B. & COSGRAVE) The Lunacy (Ireland) Act, 1867 (30 & 31 Vict. c. 118), has
 v. M'LOUGHLIN. to my mind an important bearing on this case. It is "an Act to
 Ronan L.J. provide for the appointment of the officers and servants of District
 Lunatic Asylums in Ireland," &c. Power was given to the Lord
 Lieutenant in Council by sect. 2 to determine the staff of officers
 of any district lunatic asylum; to appoint the salaries and define
 the duties of the officers and servants and "make rules and regu-
 lations for the control and guidance of the said officers and
 servants." That Act was in force up to the passing of the Local
 Government Act of 1898.

Under the Lunatic Asylums (Ireland) Accounts Audit Act,
 1868 (31 & 32 Vict. c. 97), provision is made for the auditing of
 Asylum accounts. Sect. 6 enacts that the accounts of the receipts
 and expenditure shall be audited and examined "by the auditor
 of accounts relating to the relief of the poor for the union in
 which such asylum is situate."

I have not found any statute giving either the Poor Law
 Commissioners or the Local Government Board any power or
 authority over lunatic asylums, their rules or officers or audit
 prior to the Act of 1898. The auditor in the Act of 31 & 32 Vict.
 c. 97 is only a *persona designata*, and the Act provides a self-
 contained code as to the powers and duties of the auditor,
 and of the Asylum authorities and their officers in relation to
 the audit.

It is similar to the Act of 1871 as to the audit of towns. Both
 are complete codes and the Poor Law Board had no powers or
 functions or duties under either. There was no Local Govern-
 ment Board in 1871. It is, I think, plain that the powers of the
 Lord Lieutenant in Council under sect. 2 of the 30 & 31 Vict.
 c. 118 (to make orders appointing the salaries and defining the
 duties of the officers and servants, and to make rules and regula-
 tions for the control and guidance of the officers and servants)
 was not transferred to the Local Government Board by sect. 6 of
 Local Government Act of 1872, as the operation of that section is
 expressly limited by the words "only so far as may be necessary

for exercising the powers and duties transferred by this Act," and no powers and duties in respect of lunatic asylums are transferred by the Act.

The Lunacy Acts and the orders made thereunder by the Lord Lieutenant in Council were the code applicable to lunatic asylums. The Local Government Board had nothing to say to this code. No powers under the Lunacy Acts were transferred to the Local Government Board by the Act of 1872 creating this Board. That Act did not deal with them at all, and I cannot find that any other Act did so prior to the Act of 1898. I have not come across any Local Government Board order purporting to deal with lunatic asylums prior to the Act of 1898. The administration of the Lunacy Acts appears to have been quite distinct from that of the Poor Law Acts.

On the other hand, as regards poor law guardians, the Local Government Board, at the date of this Act, was the supreme authority. By sect. 2 of the Local Government Act of 1872 all the powers of the Poor Law Commissioners were transferred to the Board. These powers were very extensive under the Poor Relief Act, 1838 (1 & 2 Vict. c. 56). By sect. 3 the Poor Law Commissioners were the authority *inter alia* for making regulations as to government of workhouses, houses of industry, and foundling hospitals, and for the guidance, control, appointment and removal of officers, also for the keeping, examining, auditing, allowing, or disallowing of accounts. They had power to delegate to assistant commissioners any of their powers except that of making general rules. By sect. 11 they had very full powers as to audit, including the power to delegate to the auditor any power which they could delegate to assistant commissioners: sects. 94 and 95.

In sect. 16 of the Medical Charities Act, 1851, there is a remarkable provision giving powers of inquiry and inspection which would appear to include audit, but which appears to me to apply only to the purposes of that Act and not to unions generally.

However, the Poor Law Commissioners were the body to appoint the auditor and they had the statutory power to define his duties: they were also the body to define the duties of the union officers; they could, therefore, prescribe the duties of both

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the auditor and the officers at the audit. I find the following remarkable clause in article 7 of the Union Accounts Order, 1853:—"The auditor shall, whenever he may in the performance of the duties of his office think fit so to do, require any officer rendering an account, or any other officer of the union, or any person represented to have supplied any goods or materials, or executed any work for the use of the union, or any other person who, in the judgment of the auditor, shall be able to give information of such account or supply, or execution of work, to appear before him, and to produce any accounts, books, or papers in his possession relating to the subject of his inquiries, and the auditor shall, if he thinks fit so to do, require such officer to verify such account on oath, and shall, if he think fit, examine on oath such officers and persons respecting any item or charge in the accounts of the said union; or he shall require them to subscribe a declaration of the truth of the matters respecting which they shall have been so examined, first forewarning them of the penalties as provided for parties giving false evidence or refusing to give evidence under the provisions of the said recited Act" (1 & 2 Vict. c. 56, s. 13). The accounts to be kept and the duties of each officer in connexion therewith are prescribed in the earlier part of the order. The clause which I have quoted was plainly *ultra vires*.

I find that in 1882 the Local Government Board made an order regulating meetings and proceedings of Boards of Guardians and the appointment and duties of officers. Article 51 deals with their "Duties in respect to audit of accounts" thus:—"Every officer acting under this order shall duly and punctually keep such books as may be prescribed in any order of the Local Government Board, in force at the time, for keeping and auditing the accounts, and shall lay such books, together with the vouchers and other necessary documents, before the auditor, properly balanced and made up, at the time fixed for the audit, or for any adjournment thereof; and every such officer shall, when required so to do, furnish to the auditor or to the Board of Guardians any abstract, statement, or explanation, verbally or in writing, respecting his accounts and the items contained therein, or the vouchers relating thereto." This order does not deal with

the auditor, thus showing that it was by virtue of its authority over the guardians and officers that article 51 was made.

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It follows from this, that if the Local Government Board has any power to make regulations governing the committees of asylums, their officers, or their affairs, this must be found in the Act of 1898 or some subsequent Act. It is plain that the Legislature cannot have intended to create two distinct rule-making authorities for lunatic asylums, each with full powers.

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It is also plain that the powers of the Lord Lieutenant in council to make rules under sect. 2 of the Lunacy (Ireland) Act of 1867 extended to all the duties of the officers of asylums.

It appears to me clear on the face of the Act of 1898 that these powers were after that Act to be exercised by the Asylum committee with the consent of the Lord Lieutenant, and that this was to be the authority for making rules for the government of the Asylum, and the regulation of the duties of the officers of the Asylum. "No man can serve two masters," and it seems obvious that it cannot have been intended that there should be two rule-making authorities for asylums. The Local Government Board cannot also be the rule-making authority for the same purpose.

The sections of the Act of 1898 dealing with lunatic asylums are sects. 9 and 84. Neither section contains any reference to the Local Government Board. The only power given to the Local Government Board in connexion with committees of County Councils that I can find is in article 19 of the Application of Enactments Order of 1898. Article 19 (1) provides that the accounts "shall be made up yearly . . . in such form as the Local Government Board prescribe." They may prescribe the form in which the accounts are to be made up. Article 19 (3) provides that the Local Government Board may, with respect to any audit to which the article applies, make rules modifying the enactments as to the publication of (a) notice of the audit, (b) of the abstract of accounts, and (c) of the report of the auditor. This article 19 applies to committees generally. It seems to me doubtful whether 19 (1) would apply to an Asylum committee for which a specific rule-making authority is provided by the Act.

Appeal. Even if it did so apply, it would authorize the prescription of the
 1916. form in which the accounts were to be made up—yearly or half-
 REX yearly—nothing more.
 (L. G. B. & COSGRAVE) The error which the Local Government Board appears to
 v. have fallen into is that it has assumed that it has the same
 M'LOUGHLIN. powers of making rules governing the committee and officers
 Ronan L.J. of a lunatic asylum as it has in respect of a board of guardians,
 its committee and officers, over which it had full control
 under the powers of the Poor Law Acts, vested in it by the
 Act of 1872. It is plain that if it was intended by the Act of
 1898 for the first time to give the Local Government Board in
 respect of lunatic asylums and their officers the very extensive
 powers it possessed over guardians, their committees, and
 officers, this would have been clearly expressed. There is not
 a suggestion of anything of the kind in the Act. I think it will
 appear from the Act that the authority to make regulations for
 the Asylum committee and their officers was the committee with
 the approval of the Lord Lieutenant. I can find no provision,
 applying to Asylum committees as such, in which the Local
 Government Board is even mentioned.

Sect. 9, sub-s. 6, of the Local Government Act, 1898, provides that asylum committees "may, and if required by the Lord Lieutenant shall, make regulations respecting the government and management of every lunatic asylum for their county . . . and the regulations when approved by the Lord Lieutenant, with or without modifications, shall have full effect, and shall have the same effect for the purposes of the fourth section of the Lunatic Asylums (Ireland) Act, 1875, as if made by the Lord Lieutenant and Privy Council."

Sect. 84, sub-s. 1, provides that every Asylum committee "shall appoint" a resident medical superintendent, and at least one assistant medical officer; and "may appoint" such other officers as they consider necessary for the performance of their duties in relation to lunatic asylums; "and every officer so appointed shall perform such duties and be paid such remuneration as the council (acting through their committee) may assign to him."

A comparison of these sections with sect. 90, which deals with a committee of a board of guardians, over whom and whose officers

the Local Government Board has plenary powers, shows that the framers of the Act saw plainly that in the case of sects. 9 and 84 the Local Government Board had no powers of making regulations, while in respect of sect. 90 they had full power to do so. We have before us rules and regulations, made in 1902, under sect. 9, by "the county council, through the said committee." There is no suggestion that they are ultra vires. They define, in the most minute manner, the duties of the various officers. It would be a curious thing if the Local Government Board had a concurrent authority to make rules defining the duties of the same officers. Further, before the Local Government Act of 1898, rules were made under the Lunatic Asylum Act of 1867 for the management of lunatic asylums by the Lord Lieutenant in Council. By s. 110 of the Act of 1898 these rules were to remain in force "until the first regulations under this Act come into force," and then "the said rules shall cease." The regulations "under this Act" are those under sect. 9, sub-s. 6. They are substituted for the rules made by the Lord Lieutenant in Council under the Lunacy Acts. But the Committee, with the consent of the Lord Lieutenant, are the rule-making authority under the Act of 1898.

I think the intention is manifest that there should not be two rule-making authorities for lunatic asylums and their officers, and that the committee and the Lord Lieutenant are substituted for the Lord Lieutenant and Privy Council as the authority under the Act. Lord Chief Baron Pallett has described the Act of 1898 as "a marvellous piece of legislation," but absolute perfection cannot be hoped for. I venture to think that sect. 108, sub-s. (1) (c), was really intended to cover this case, but that the distinction between the Lord Lieutenant in Council and the committee, with the consent of the Lord Lieutenant, was overlooked. Sect. 108, sub-s. 1 (c), was really intended to prevent the existence of two rule-making bodies having the power to make rules in respect of the same subject-matter. I am of opinion that it appears on the face of the Act of 1898 that the rule-making authority for regulating the government of lunatic asylums and officers and servants thereof is the committee, with the approval of the Lord Lieutenant; and that, save as to the matters subsequently

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I now proceed to show what was done by the Local Government Board prior to the Act of 1902. In 1899 it made a series of orders, among others the Asylum Accounts Order, revoked by article 4 of the Public Bodies Order of 1904, and the "Union Accounts Order of 1899." The two orders are similar in character, and purport to regulate the action of the governing body and the officers in each case. The provisions as to audit, which are the most important, are identical in the two orders.

Article 20 of the Union Accounts Order provides that if the auditor shall doubt the correctness of any accounts, he may by summons "require any person to attend before him at any audit or adjournment thereof for the purpose of giving any information or evidence upon any matter connected with the accounts of any officer of the guardians liable to account, and may make inquiry into any such matter, and may administer oaths, and may examine all such persons upon oath, and may require and enforce the production upon oath of books," &c. Article 21 of the Asylum Accounts Order is in exactly similar terms, "officer of committee" being substituted for "officer of the guardians." The Union Accounts Order, 1899, was revoked by the Union Accounts Order, 1905. I have already shown the full powers of the Local Government Board under the Poor Law Acts; and, except the extension to outside persons in article 20 of the Union Accounts Order, 1899, all its provisions would appear to be authorized by these Acts. But while all these provisions of the Union Order purport to be made in pursuance of the Poor Relief Act, 1838, and the Acts amending it, the same identical provisions are made in the Asylum Order "under the provisions of the Local Government (Ireland) Act, 1898." This is the most complete proof of the assumption by the Local Government Board that the Act of 1898 gave them the same powers over the Asylum committee and their officers as they had in respect of poor law unions.

The Asylum Accounts Order was revoked by the Public Bodies Order, 1904. Article 21 is not repeated in the latter, but there are numerous provisions similar to those in the revoked

Order dealing with the government of the asylum and the duties of the officers clearly within the scope of rules under sect. 9, sub-s. 6, of the Act of 1898. *Appeal.*
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After the elaborate and lucid manner in which Gibson J. has dealt with sect. 22 of the Act of 1902, I do not think it necessary to add anything to what he has said. I may, however, observe that sect. 24 provides that the Act is to be construed as one with the Act of 1898. If the Asylum committees and their officers are excluded from the rule-making powers of the Act of 1898, I think the Local Government Board would be excluded from making rules affecting them under the Act of 1902. The committee, with the approval of the Lord Lieutenant, remain the special rule-making authority for the purpose.

The regulations are only for the audit—that is, the performance of the work of the auditor. The words “mode of conducting the audit” do not give power to impose duties on persons who do not conduct the audit, and who are bound by law to obey the directions of other persons (the committee) and the rules under sect. 9, sub-s. 6. There is a special power to prescribe the form in which—not the person by whom—the accounts are to be kept. But sect. 9, sub-s. 6, gives full power to the committee, with the consent of the Lord Lieutenant, to do this. The only person with whom power is given to deal is the person who is to produce the accounts. I do not think the section gives any power to make rules on subjects within the scope of sect. 9, sub-s. 6. Such a construction would involve either a repeal in part of that enactment or two authorities, each entitled to make rules, and would be, in my opinion, contrary to the intention of the two Acts read together. All the judges in the Court below thought the conditional order could not be sustained in its entirety. The notice of appeal simply asks that this order should be reversed, i.e. the conditional order made absolute.

We have been asked to amend the conditional order by limiting it to “calling back” accounts. In addition to the reasons already stated as to the powers of the Local Government Board, I am of opinion that we should not exercise our discretion as to amendment for the purpose of making our order in terms unintelligible to any ordinary person.

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The Clonmel District Lunatic Asylum is managed by a joint committee appointed by the county councils of the North and South Ridings of Tipperary, under the provisions of sect. 9, sub-s. 2, of the Local Government (Ireland) Act, 1898; and under sect. 9, sub-s. 7, of the same Act, the expenses of maintaining the asylum are defrayed by the two Ridings in proportion to the number of lunatics from each. Under the combined effect of sect. 9, sub-s. 5, and sect. 84, sub-s. 1, of the same Act, the county councils, acting through the joint committee, appoint a resident medical superintendent, and at least one assistant medical officer, and such other officers as they consider necessary for the performance of the duties in relation to the asylum, and every officer so appointed is to perform such duties and to be paid such remuneration as the councils, acting through the joint committee, assign to him.

Under sect. 9, sub-s. 6, the county councils, acting through the said committee, may, and, if required by the Lord Lieutenant, shall make regulations respecting the government and management of the lunatic asylum, and the sub-section provides that the regulations, when approved of by the Lord Lieutenant, with or without modifications, shall have full effect. Regulations under this section were duly made by the committee, and approved of by the Lords Justices, acting in the absence of the Lord Lieutenant, on the 4th June, 1902, and these general rules prescribe the respective duties of the resident medical superintendent and the clerk. The clerk is to attend at the asylum offices during specified hours, and is to take charge, under the resident medical superintendent, of the various letters and books. He is to keep the statutory register of admissions, discharges, and deaths, and the various account books as may be prescribed, and also to keep the books prescribed by the inspectors of lunatics, and the Local Government Board, and also the letter or correspondence book, and further, immediately, upon the reception of a person as a lunatic, to make an entry with respect to such person in the register of admissions according to the prescribed form.

The medical superintendent is to supervise and regulate the whole establishment, and he is responsible for the manner in which the various duties of the clerk are performed, and he is to see that the books and accounts are regularly kept, and that the correspondence conducted under his direction and supervision shall be carefully carried on, and he is also to be responsible for the lodgment and disbursement of such public moneys as may be placed in his hands.

It thus appears to be clear from the rules that the resident medical superintendent is responsible for the manner in which the various duties of the clerk are performed, and that the legal custody of the books is in the resident medical superintendent, but that during certain specified hours the clerk is to attend and take charge of them.

Under the provisions of article 19 (2) of the Application of Enactments Order of the 22nd December, 1898, the accounts of all the receipts and payments of every county and district council, and their committees and officers, are to be audited by an auditor of poor law unions, and sects. 11 to 18 of the Local Government (Ireland) Act, 1871, as amended by sect. 6 of the Local Government (Ireland) Act, 1872, or any subsequent enactment, apply accordingly, and it is under this provision that the audit of the accounts of the asylum takes place, and I assume, without discussing the difficulties raised by Lord Justice Ronan, rightly takes place.

It is, therefore, necessary to inquire particularly as to the statutory functions of the auditor under the Act of 1871, and how they have been altered or modified by subsequent legislation.

Under sect. 12 of the Local Government (Ireland) Act, 1871, the auditor is to examine into the matter of every account which is to be audited by him, and shall disallow and strike out of every such account all payments, charges, and allowances made by any person and charged upon the funds of any town contrary to law, or which he deems to be unfounded, and shall surcharge the same upon the person making or authorizing the making of the illegal payment. Sect. 14 deals with the powers of the auditor at the audit, and provides that every auditor may, by summons in writing, require the production before him of all books, deeds, contracts, accounts,

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 1916. necessary, and may require any person "holding or accountable" for any such books, deeds, contracts, accounts, vouchers, documents, or papers, to appear before him at such date, or any adjournment thereof, and if thereunto required by such auditor, to verify on oath or affirmation the truth of all such accounts and statements from time to time respectively, or subscribe a declaration as to the correctness of same. Sect. 15 provides that if a person shall refuse or wilfully neglect to attend in obedience to any summons of any auditor, or to give evidence, or should refuse to produce the books, every person so offending shall be deemed to be guilty of a misdemeanour.

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It is to be noted that the power of the auditor under these sections is limited to two things, 1, to require the person holding or accountable for the books, &c., to appear before him at such audit, and, 2, to require the person so appearing to verify on oath or affirmation, or subscribe a declaration as to the correctness of the accounts. He has no power under these provisions to administer an oath unless to a person who is holding, or accountable for, the books.

The powers of the auditor were considerably increased by sect. 20 of the Local Government (Ireland) Act, 1902, which provides that on the audit of the accounts of any public body the auditor shall charge against any person accounting the amount of any deficiency or loss incurred by his negligence or misconduct, or any sum which ought to have been, but was not, brought into the account by him, and shall in any such case certify the amount due from him. This section was fully considered, and its scope explained, in the case of *R. (O'Carroll) v. King* (1). The statute further provides, in sect. 22, sub-s. 1, that the Local Government Board may make general regulations for the audit of accounts of public bodies and their officers, and may prescribe the form in which the accounts are to be kept, the mode of publishing, the time and place for holding the audit, the person by whom and the time within which the accounts are to be produced for audit, and the mode of conducting the audit.

The Local Government Board accordingly, on the 17th December, 1904, issued a General Order, entitled "The Public Bodies Order, 1904," which was made under the powers conferred on them by sect. 108 of the Act of 1898, and sect. 22 of the Act of 1902.

The Order was intended to be a complete code of the duties of auditors in reference to audits, and of accounting officers in reference to accounts. It provides (article 2 (*d*)) that the expressions "secretary" and "clerk" of a public body shall include any person, by whatever name called, who performs, or may be required to perform, under or by direction of a public body, any duty or duties therein directed to be performed by a secretary or clerk. In Part I of the Order—articles 5 to 24 inclusive—it prescribes the duties of the secretary or clerk in reference to accounts and payments; and in articles 25 to 39 it prescribes the duties of the same officer in reference to audits. There can be no doubt, on the construction of the Order, that "the secretary or clerk," mentioned in Articles 5 to 39, is the resident medical superintendent. This appears to be clear from the provisions of article 103, which applies Part I of the Order to asylum committees, and an examination of the forms in the schedule; but any doubt upon the point is removed by the letter of the Local Government Board of the 12th March, 1906, authorizing certain departures from the regulations in pursuance of a power in that behalf contained in article 3. In that letter the Local Government Board is careful to point out that in the application of the Public Bodies Order to lunatic asylums the Local Government Board regard the secretary or clerk as meaning the resident medical superintendent, and orders and forms were to be so read, and that, subject of course to the superior control of his committee and other constituted authority, the resident medical superintendent is responsible for the entire management of his particular institution. The letter further says: "It rests with him, therefore, to require books and documents to be prepared, verified, and kept by specified subordinate officers, subject to his supervision and control. He cannot be permitted to divest himself of the responsibility for seeing that they discharge those duties in a satisfactory manner, or, should they fail to do so, for reporting their negligence to his committee so that they may be suitably dealt with."

Appeal.

1916.

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COSGRAVE)

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Appeal. A new Order was made by the Local Government Board on
 1916. the 5th February, 1915 (The Public Bodies Order, 1915), which
 REX is to be read as one with the Order of 1904. It revokes but
 (L. G. B. & substantially reproduces articles 31 and 110 of the 1904 Order,
 COSGRAVE) and then further provides by article 31 (2) that "the secretary or
 v. clerk," and by article 110 (2) that "the clerk or chief clerk of the
 M'Loughlin. asylum committee, shall render to the said auditor all such
 assistance during the course of the audit as the said auditor may
 Molony L.J. from time to time require, whether by preparing returns, produc-
 ing documents, calling back accounts, vouchers, or other documents,
 or otherwise as to the said auditor may seem requisite for facilitating
 or expediting the said audit."

It is a curious construction of the Order now contended for by the Local Government Board that while "secretary or clerk" in Part I of the Order, and, in particular, in article 31, means the resident medical superintendent, the word "clerk" in article 110 has an entirely different meaning, and means the subordinate officer who is under the control and authority of the medical superintendent.

I assume, without deciding, that Mr. M'Loughlin is the clerk who is designated in article 110, and I now proceed to consider whether the Local Government Board is authorized by law to compel him to comply with the terms of that article.

The Order states that the clerk is to render to the auditor all such assistance during the course of the audit as he, the said auditor, may from time to time require. The effect of this is that he is to be in constant attendance upon the auditor, and that he is to give whatever assistance the auditor may ask of him. The Order then proceeds, by way of illustration, to mention some of the particular duties which may be cast upon the clerk "whether by preparing returns, producing documents, calling back accounts, vouchers, or other documents, or otherwise as to the said auditor may seem requisite for facilitating or expediting the audit."

The effect of this Order is that the clerk is made the clerk of the auditor for the purpose of the audit, and would be compelled to disregard his duties and obligations to his own employers, which are prescribed by statutory rules approved of by the Lord Lieutenant.

I do not propose to deal with the occurrences before Mr. Considine in 1914, because an entirely new situation arose after the Order of 1915 was made, and when Mr. Cosgrave went down to carry out the audit in December, 1915.

Mr. Cosgrave on the 15th December, 1915, sent to Mr. M'Loughlin a notice requiring him to discharge all his duties as clerk, and, under the obligations cast upon him by the Order of 1915, to attend and give such assistance as he might require in the preparing of returns, producing of documents, and the calling back of accounts or other documents as laid down by this Order. Mr. M'Loughlin on the same day replied declining to render the assistance which Mr. Cosgrave maintained was portion of his duties as clerk of the Asylum, but stating that he was quite prepared to give all the information which the auditor might require arising out of the inspection of the accounts, and to furnish all necessary explanations.

The issue was then knit between the parties, and Mr. Cosgrave proceeded to require the clerk to read out from the admissions register the entries which he had himself made therein, so that Mr. Cosgrave might compare them with the admission warrants, and the morning-statement book, and see if the entries made by Mr. M'Loughlin in the register were correct.

The admission warrants were, of course, the warrants which were brought with each patient to the asylum, and must comply with the statutory requirements. The morning-statement book is a book which shows the admissions and the number of patients in the Asylum on each day of the year, and the admissions register is the book in which the admissions are registered and the chargeability of the body responsible for the inmate is shown. Mr. M'Loughlin states that during the period 1900 to 1912 he had never been asked to call back entries in this manner, and he points out that such a request was tantamount to an invitation to him to review his own work in violation of the first principles of auditing, and would afford an opportunity to the unscrupulous for the commission of frauds.

The committee in a previous resolution had stated that on grounds of public policy they were convinced that it was most unreasonable that any official should be called upon to call back

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or check at the audit any entries made by him, or for the accuracy of which he was responsible, and it is undoubtedly clear that this was also at one time the view of the Local Government Board, because in their letter to the resident medical superintendent of the 9th February, 1914, they describe the same class of work which they now seek to cast on Mr. M'Loughlin as one "obviously undesirable" to be performed by him in the circumstances.

In my opinion the duties which are sought to be imposed upon Mr. M'Loughlin here are part of the auditor's work, and the question is whether a regulation made under sect. 22 of the Act of 1902 can impose upon him such duties. It can only impose these duties upon him by reason of the words in the section empowering the Local Government Board to make general regulations for the audit of the accounts, and that the regulations may prescribe the mode of conducting the audit. I am, however, satisfied that these words are not sufficient to cast upon an officer new duties which he is to perform without remuneration, and in violation of the wishes of his employers and the duty which he owes to them.

Sect. 22 of the Act of 1902 is adapted with very slight alterations from sect. 5 of the District Auditors Act, 1879. Sect. 4 of the Act of 1879 provides that the Local Government Board may, with the consent of the Treasury, appoint from time to time a person or persons, either temporarily or otherwise, to assist a district auditor in the performance of his duties. It thus appears that in England it was contemplated that there might be two paid officials conducting an audit, and in such circumstances regulations might well be made dealing with the mode of conducting the audit and prescribing the respective duties of each auditor. The Local Government Board might, perhaps, give the auditor power to avail himself of the assistance, gratuitous or paid, of other persons in reference to what is termed "calling back," and such like matters, but there is a wide difference between being able to avail oneself of assistance if tendered or procured, and being entitled to require such assistance as a legal right. In the general order of 22nd March, 1880, made by the English Local Government Board, under the corresponding section of the District Auditors Act, 1879, the Local Government Board are careful to

lay down in express terms (article 16) that the district auditor shall examine and collate the several books and papers of account, and shall ascertain that the several entries correspond with and balance each other, where such balance may be required. In England, therefore, the auditor must himself examine and collate, and is not allowed to rely on the reading out by an accounting official of the entries made by him in the books under audit. It would, I think, require very clear words in a statute to entitle an auditor to require the gratuitous assistance of a public official in the performance by the auditor of his own duty, and it is idle to suggest that an obligation, so oppressive and far-reaching, can be created by a section which only empowers the Local Government Board to make regulations as to the mode of conducting the audit—a mere administrative provision, as has been so clearly pointed out in the admirable judgment of Mr. Justice Gibson. I am of opinion that the order of the King's Bench Division was right, and ought to be affirmed.

Solicitors for the appellants: *T. T. Mccredy & Son.*

Solicitors for the respondent: *J. J. O'Shea & Co.*

C. L.

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WALLACE BROTHERS v. DIXON.

Nov. 28.

Shop—Shop-assistant—Retail Trade—Coal Merchant—Branch Office—No Goods kept upon the Premises—Shops Act, 1912 (2 Geo. 5, c. 3), s. 19, sub-s. 1.

The word “shop” in sect. 19, sub-s. 1, of the Shops Act, 1912, has an extended and artificial meaning that goes beyond the popular and recognized meaning of the word.

A coal merchant's branch office, in which no coal is kept and only orders are dealt with, is a “shop,” and the attendant in it, who takes the orders, is a “shop-assistant” within the meaning of that sub-section.

CASE STATED for the opinion of the Court.

At a sitting of the Dublin Metropolitan Police Court, holden in and for the said police district on the 5th and 10th days of July, 1916, before Mr. Swift, Chief Divisional Justice for Dublin, Wallace Bros., Ltd., were charged by summons issued on the 14th day of June, 1916, on the complaint of Samuel W. Dixon, an inspector appointed under the Shops Act, 1912, upon behalf of the Rathmines and Rathgar Urban District Council, for that on the 22nd day of March, 1916, they, the said Wallace Bros., Ltd., being the occupiers of a shop, situate at 1 Duggan Place, Rathmines, wherein a shop-assistant, Margaret W. Smith, was employed between the hours of 11.30 a.m. and 2.30 p.m., did fail to allow the said assistant an interval of not less than three-quarters of an hour for dinner, contrary to the statutes in such case made and provided.

The defendants were convicted and ordered to pay 1s. fine and 10s. costs.

The following facts were proved :—

On the 22nd day of March, as aforesaid, the complainant called at the defendants' premises, where the said Margaret W. Smith is an assistant. No notice under the Shops Act, 1912 (2 Geo. 5, c. 3), was exhibited. The assistant gets no free interval

for meals under the Shops Act. She attends in the premises from 9 a.m. till 5 p.m. on five days in the week, and on Saturdays from 9 a.m. till 1 p.m. She takes orders for coal, and sends the orders to the office of the defendants. She gets her luncheon in, but has to leave it if a customer comes in. She made no complaint to the inspector. Coal can be ordered at the premises in any quantity, from a quarter of a ton upwards. It is delivered from Ringsend. The said Margaret W. Smith takes her meals in the said premises, but there is no one to relieve her, and she is on duty all the time. When she goes out she locks up the place. She has sole charge of the business there, and it is her duty to be there when a customer comes in. When she gets an order she sends it to the defendants' office in Westmoreland Street. She has plenty of time for her lunch, subject to possible interruptions. She gets about six orders a day. The premises constitute merely a branch of the defendants' business as coal merchants. She does not live on the premises, and only occupies the ground-floor.

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There was another summons heard before the said justice on the 5th and 10th days of July, which charged the defendants under the Shops Act, 1912, with failing to affix in the said shop, in the manner prescribed, a notice in the prescribed form specifying the day of the week on which their shop-assistant was not employed after half-past one o'clock.

The two summonses involved the same point, viz., whether the said premises at Rathmines constitute a "shop" within the definition of that word in the Shops Act, and the same order was made on each summons.

The justice held that a retail business was carried on upon the premises, thus constituting them a shop within sect. 19, sub-s. 1, of the Shops Act, and that the said Margaret W. Smith was a "shop-assistant" of the defendants within the same section. As to the difference between a wholesale and a retail "trade or business," the justice referred to the language of Bacon V.-C. in *Treacher & Co., Ltd., v. Treacher* (1), cited by the solicitor for the complainant.

The case having been at argument on the 15th day of

K. B. Dir. November, 1916, was remitted to the justice to answer the following question, viz. :—

WALLACE "Having regard to the nature of the goods sold, was coal sold
v. *DIXON.* to customers in small quantities?"

The answer of the justice was as follows :—

"Having regard to the nature of the goods sold, coal was sold to customers in small quantities, but not exclusively so, as it could also be purchased by customers in large quantities."

Swayne and Dickie K.C., for the appellants :—

The Shops Act, 1912 (2 Geo. 5, c. 3), is a consolidation Act. To arrive at the meaning of "shop" the whole code must be considered. The first Act was the Act of 1892 (55 & 56 Vict. c. 62), which dealt solely with the employment of young persons in wholesale and retail "shops." The next Act was the Shops Act, 1895 (58 Vict. c. 5), which amended the Act of 1892, with regard to penalties. The Act of 1899 (62 & 63 Vict. c. 21) required seats to be provided for employees in premises where goods were actually "retailed" to customers. The Act of 1904 (4 Edw. 7, c. 31) provided for early closing. This defined "retail trade." The Shops Act, 1911 (1 & 2 Geo. 5, c. 54), defines "shop," as does also the Shops Act, 1912 (2 Geo. 5, c. 3), sect. 19. It is clear from these Acts that when the Legislature speaks of "retail" it means retailing of goods over the counter in small quantities. It is only when dealing with young persons they bring in "wholesale shops." Sect. 2 of the Act of 1912 deals with "young persons." "Include" gives the full definition: see *Dilworth v. Commissioner of Stamps* (1). The words "premises where retail business is carried on" were put in to cover cases where the structure was not a shop in the ordinary sense; but, whatever the grounds were, "retail" business in the ordinary sense must be carried on.

All the decided cases deal with the retail service of customers. *Smith & Sons v. Kyle* (2); *Willesden U. D. C. v. Morgan* (3); *Melluish v. London County Council* (4); *Prance v. London County Council* (5); *Gordon Hotels, Ltd., v. London County Council* (6), are all cases to which the Act does not apply.

(1) [1898] A. C. 106.

(2) [1902] 1 K. B. 286.

(3) [1915] 1 K. B. 349.

(4) [1914] 3 Q. B. 325.

(5) [1915] 1 K. B. 688.

(6) [1916] 2 K. B. 27.

To constitute a "shop" receiving of orders and serving of customers must be carried on where the goods are. Coal merchants of this class do not retail goods. Retail is not the opposite of wholesale. *Treachër & Co., Ltd., v. Treacher* (1) does not apply. *Stallard v. Marks* (2) was a licensing case, and does not apply.

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J. S. Russell and W. G. Gibson K.C., for the respondent:—

Under section 19 the expression "shop" includes any premises where any retail trade or business is carried on. The word "includes" is larger than the word "means," which latter word is used in section 19 when dealing with the expression "shop assistant."

The only difficulty in this case is the meaning of the words "retail trade or business," in respect of which there is in the Act no express definition. They are stated to include certain businesses which would not in the ordinary acceptance of the words appear to be retail trade or business, but the meaning of particular words in a statute, in the absence of express definition, is to be found "not so much in a strict etymological propriety of language, nor even in popular use, as in the subject or occasion on which they are used, and the object that is intended to be attained": *per* Abbot C.J. in *R. v. Hall* (3), approved in *The Lion* (4), and *Collman v. Roberts* (5).

In *Treacher & Co., Ltd., v. Treacher* (1) Bacon V.-C. says:—"As a general rule 'wholesale' merchants dealt with persons who bought to sell again, whilst 'retail' merchants dealt with consumers." This is apparently the only attempt at a definition of the term in any authority; the ordinary meaning of the term "retail" is a sale in small quantities direct to a consumer; a small quantity is a relative term, and in regard to coal a sale of a quarter of a ton is a small quantity.

It is not necessary to make premises a shop that goods purchased should be on the premises: *Stallard v. Marks* (2). Nor is it necessary, as contended on the other side, that the goods purchased should be handed out or capable of being carried away.

(1) [1871] W. N. 4.

(2) 3 Q. B. D. 412.

(3) 1 B. & C. 123, at p. 136.

(4) 6 Moo. P. C. N. S. 525.

(5) [1896] 1 Q. B. 457.

K. B. Div. In *Prance v. London C.C.* (1) Atkins J., at p. 696, says:—
 1916. “In the case of an ordinary shop a customer enters and
 WALLACE makes a contract for the purchase of a particular article,
 v. which is either delivered to him then and there, or is after-
 DIXON. wards delivered to his order.” In sect. 19 “shop-assistant” is
 defined as “any person employed in a shop in connexion
 with the receipt of orders.” The definitions in sect. 19 of
 “shop” and “shop-assistant,” apart from any authorities, make
 the whole matter perfectly clear. As to the meaning of “shop,”
 they referred to the Home Office Memorandum on the Law
 relating to shops. Title in Halsbury’s Laws of England Supple-
 ment, 1916, par. 1159, p. 682.

Cur. adv. vult.

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GIBSON J. :—

Jan. 15.

The point for decision is new and important. The defend-
 ants admittedly carry on a retail trade. If the place where
 Miss Smith took orders was an outpost of a central retail shop
 proper, the question would be simpler, but it is argued that, from
 the nature of her employers’ business, had she been engaged in
 duty at the main establishment she would not have been a shop-
 assistant. As coal merchants, the defendants had no coal stored on
 their main premises, and took coal required by their customers
 from Ringsend. Had coal in any quantity been kept at their
 principal establishment, it is not disputed that such establish-
 ment would have been a retail shop notwithstanding that most of
 the coal for retail customers would have been carted from a
 distant yard. The argument for the defendants is that, there
 being no coal kept at the central premises, where only orders were
 received, there was no shop there, and that the receipt of orders
 and despatch of goods mentioned in sect. 19 refer only to shops
 where goods, the subject of such orders, were kept and from
 which they would be sent out. Reliance is placed on the expres-
 sion “serving of customers” which it is said points to customers
 who may be present on the shop premises. No doubt retail trade
 may be carried on in a place which is not, in ordinary language, a
 shop. But the question before us is not what is the usual meaning

of "shop," but what is "a shop" in a statute intended for the benefit of employees, and which (inter alia) speaks of "wholesale shops," a description not applied in common speech to wholesale businesses. It is clear that customers may be served by complying with written or telephoned orders; and the defendants' contention, if correct, would make the protection of shop-assistants depend on the accidental arrangement of the retail trader's business premises. His stores might be close by, separated from his chief place of business only by a lane. Many authorities were cited. Few give any assistance, but the reasoning in *George v. James* (1); *Collman v. Roberts* (2); and *Smith & Sons v. Kyle* (3), where Lord Alverstone apparently considered that a "shop" as a physical structure might have different meanings in the same enactment, is to some extent relevant.

The question for consideration is whether a place where orders only are taken in connexion with a retail business not far away, and in which there are no goods kept to be sent out to customers, can be a shop within sect. 1.

Section 1, sub-sects. 1, 2, and 3, as to hours, notice, and meals, contains nothing to restrict the full force of the definition in sect. 19. These sub-sections do not specify the shop-assistant's duty as to serving customers or otherwise. Sub-sect. 4, no doubt, gives a limited protection in favour of the trader. It is confined to customers actually present. But this restricted exception, for the benefit of the trader, cannot be read as narrowing the operation of sub-sects. 1, 2, and 3 to shops in which goods for sale were kept. Such a construction would contradict sect. 19, which specifically states orders as a subject of the shop-assistant's duty. An employer plainly could not, after closing to exclude customers from entering, claim to be entitled to keep his staff at work on orders received by post, or on despatch of goods: *George v. James* (1). Section 3 directs seats to be provided for female shop-assistants employed "in the serving of customers," a phrase which, on the context, would seem intended to indicate customers inside the shop, as in sect. 1, sub-sect. 4.

Section 4 requires shops to be closed "for the serving of

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(1) [1914] 1 K. B. 278.

(2) [1896] 1 Q. B. 457.

(3) [1902] 1 K. B. 286.

K. B. Div. customers" after 1 o'clock. It is argued that such serving must
 1917. be of the same character as that mentioned previously. But the
 WALLACE expression must include "in connexion with the serving of
 v. customers," as in sect. 19, otherwise the words "in connexion
 DIXON. with" would have no effect whatever. The proposed construction
 Gibson J. would, as already observed, deny operation to sect. 19 in reference
 to orders and despatch. Closing for the serving of customers is
 not limited to customers coming in. Customers may be served by
 orders as well as by present delivery. A shop would not be closed
 for such service if it was kept open for such orders. I think that
 service of customers in this section comprises all the species of
 duty of shop-assistants described in sect. 19. Goods are often
 ordered by a trader from London or elsewhere for a customer,
 and to save time sent to the customer direct, though the trader is
 the vendor. I am unable to accept the defendant's interpretation.
 The same language occurs also in sect. 4, sub-s. 5, and in sub-s. 7,
 which is a relief provision of the same type as in sect. 1, sub-s. 4.

The definition in sect. 19 in its obvious meaning includes a
 retail shop where orders only are taken, and there is nothing in
 the enactment to make it necessary to impose on it the limitation
 now contended for. The differentia of the shop described in the
 Act is not affected whether the goods sold are brought to the
 shop and then sold, or taken from a store in the vicinity—a
 matter depending on the trader's convenience and business
 accommodation. It may not be necessary to decide it, but I am
 inclined to think that a person employed by a retail trader to
 take orders is employed "about the business of a shop" within
 sect. 1: *George v. James* (1), "in connexion with the serving of
 customers": *Prance v. London County Council* (2). These latter
 words and sect. 19 (which brings receipt of orders within the
 assistant's duty) indicate that in sect. 4 "closed for the serving of
 customers" must be read so as to include orders. Otherwise the
 language would not have anything to operate on. The definition
 in sect. 19 may overlap, and "or" may not be properly dis-
 junctive. Be this as it may, if Miss Smith in receiving and trans-
 mitting orders was not performing a duty "in connexion with
 serving customers," she was unquestionably doing so in receiving

(1) [1914] 1 K. B. 278.

(2) [1915] 1 K. B. 688, at p. 697.

such orders within the latter part of the definition. The drafting is awkward, but the mischief intended to be provided against, emphasized by sect. 9 as to trading elsewhere than in shops, is manifest, and the principle of construction stated by Lord Justice Kay in *Collman v. Roberts* (1) applies. The case is important. If we were to accede to defendant's contention, the staffs of Dublin coal merchants and other retail traders dealing in goods stored outside their head establishment would be excluded from the benefits of the statute.

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Defendant's counsel threw out that the decision of the learned magistrate would produce a revolutionary disturbance in existing business arrangements, and would be a wholly unexpected and, perhaps, unintended result of the legislation. I doubt this. The Home Office explanatory official memorandum of April 1913, noted in the 1916 Supplement to Lord Halsbury's work, shows that the view now taken is no novelty (see pp. 1, 2, 4, and 5). The memorandum of course possesses no legal authority. Our decision only applies to retail traders. Many traders carry on wholesale as well as retail business. What arrangements should be made in such a case to keep the two branches distinct is not now before us, and must be left for future decision. There was no separation proved here.

MADDEN J.:—

The office in Rathmines in which Messrs. Wallace receive orders for coal to be delivered from the stores of the company is not a "shop" within any recognized meaning of the word in the English language, and the business therein carried on is not a retail business within the primary significance of the word "retail." And yet I think that the learned magistrate was right in holding the place in question to be a "shop" in which a "retail" business was carried on. Words in an Act of Parliament are counters; the desired value and signification are assigned by an interpretation clause, and the present case is a remarkable illustration of the departure from the ordinary use of language which may be the result of the introduction into an Act of Parliament of such a clause, or by the sweeping provisions of the Interpretation Act

(1) [1896] 1 Q. B. 457.

K. B. Div. under which, aided by "benigna interpretatio," a word so little
 1917. suggestive of the feminine gender as "man" may be held to
 WALLACE mean "woman"; and a female typist has been held to be a
 v. "seaman," and a nurse a "soldier on active service."
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But although the question for our decision is the meaning to be attributed to certain words in an Act of Parliament, it is not altogether irrelevant to inquire into their meaning in the English language.

In every use of the word "shop" recorded in the "New English Dictionary" an essential element is the presence of goods in the building in which they are sold. The primary meaning of the word "retail," according to the "New English Dictionary," is "to sell (goods, &c.) in small quantities," and this is certainly etymologically correct. According to Dr. Johnson, it is "to sell in small quantities, in consequence of selling out second hand."

An office in connexion with coal-stores in which orders are received for the delivering of coal to purchasers in quantities of not less than a quarter of a ton from the wholesale store would not be ordinarily described as a shop in which coal is sold by retail. But it was competent to the Legislature for the purpose of carrying out the policy of the Shops Acts to enact that an office of this kind should be regarded as a retail shop. Whether this has been done is a question which must be decided from an examination of the series of Shops Acts which have been consolidated in the statute of 1912, in view of the mischief which the Legislature appears to have had in view.

The 19th section of the Act contains the words: "The expression 'shop' includes any premises where any retail trade or business is carried on." From the reference to the carrying on of business, as constituting a shop, it appears that the sale upon the premises of the articles in regard to which the business is carried on is not essential. The real question for our determination is the meaning to be attributed to the word "retail." I am of opinion that the word "retail" is used in this section in contradistinction to "wholesale," and that every business in which a business is carried on which is "retail" in this sense of the word is a "shop" within the meaning of the Act.

I have come to this conclusion from a consideration of the

whole course of legislation which is embodied in the Shops Act, 1912. This statute is entitled "An Act to consolidate the Shops Regulation Acts, 1892 to 1911." The earliest of these statutes, the Act of 1892, related to the employment in shops of young persons, that is, persons under eighteen years. It prohibited the employment of a young person in a shop for a longer period than the statutable allowance of seventy-four hours per week, including meal-times; from the point of view of protection afforded to the young against overworking, the particular nature of the business in which the young person is employed is immaterial. Accordingly, we find the word "shop" defined as meaning "retail and wholesale shops," and markets, and as including licensed public-houses, and refreshment houses of any kind. The expression "wholesale shop" is an inaccurate one. But the meaning of the section is clear, and the protection afforded by the statute extends to young persons employed in any place of business, wholesale or retail.

The Shop Acts of 1893 and 1895 deal with matters of detail. The Shops Act of 1899 contains provisions relating to a special class of shop-assistants which are embodied in the Consolidation Act of 1912. It provides that "in all rooms of a shop or other premises where goods are actually retailed to the public, and where female assistants are employed for the retailing of goods to the public," the employer shall provide behind the counter, or in some other suitable position, a number of seats bearing a certain proportion to the number of female assistants. This legislation is reproduced in the 3rd clause of the Consolidation Act, 1912, and applies to "all rooms of a shop where female shop-assistants are employed in the serving of customers." Reading this section of the Consolidation Act in the light of the interpretation clause, it appears that its application is co-extensive with that of the statute from which it is taken.

Legislation of a different character was introduced by the Act of 1911, to amend and extend the Shops Regulation Acts, 1892 to 1894, and reproduced in the Consolidation Act of the succeeding year. The object of this legislation was to secure to all shop-assistants as a matter of right privileges which are voluntarily accorded in well-regulated establishments. Among these is that with which the present case is conversant.

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K. B. Div. Sect. 1, sub-s. 3, thus provides: "Intervals for meals shall be
1917. allowed to each shop-assistant in accordance with the first

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schedule to this Act." It is found in this case that the assistant
in question "gets no free interval for meals under the Shops Act."

Another privilege conferred by this Act is a weekly half-holiday.
This is provided by sect. 1, sub-s. 1; and by sub-s. 3 the occupier
of the shop is obliged to fix in the shop a notice specifying the
day of the week in which his shop-assistants are not employed
after half-past one o'clock in the afternoon. Section 4 provides
for the closing of shops on the weekly half-holiday by enacting
that "every shop shall, save as otherwise provided by this Act,
be closed for the services of customers not later than one o'clock
in the afternoon" of that day.

No such notice as is prescribed in sect. 1 was exhibited, the
case of the Messrs. Wallace being: that their office in Rathmines
is not a shop within the meaning of the Shops Acts.

Leaving out of consideration the special provisions for the
needs of female assistants, the shop-assistants in whose interest
these statutes were passed are of two classes. They may be
employed for hire in wholesale establishments or warehouses; or
they may be employed in a shop within the meaning of the Act,
the nature of the latter employment being described in sects. 3
and 4 as "the serving of customers." To adult assistants of the
former class no protection is afforded, but those who are under
the age of eighteen are safe-guarded against the evil result of
over-work. The clerk in a wholesale warehouse is not, like a shop-
assistant, engaged in serving customers for as many hours as the
shop remains open, and the Legislature for obvious reasons has not
thought it needful to place him in the same position in regard to
a statutory interval for meals and weekly half-holiday.

Section 2, sub-s. 5, uses the inaccurate expression "wholesale
shops," but it does so in contradistinction to "shops within the
meaning of this Act." These words are referential to the
definition in section 19, in which the word "retail" occurs.
From this contradistinction it is clear to my mind that the word
"retail" in the latter section should be interpreted as meaning
"not wholesale," and it is equally clear that the business carried
on in the office in question is not a wholesale one.

I have come to this conclusion from a consideration of the different classes of assistants to which the statute relates, and from a comparison of the different language employed in dealing with each class, without reference to an authority which is conversant with a document of a different kind, although it is important to note that the use of the word "retail" as distinguished from "wholesale" is recognized in mercantile transactions.

It is found in this case that the business done by the assistant in question is the receipt of orders from customers, which she transmits to the defendants' office in Westmoreland Street. Although this would not be ordinarily described as the service of customers, it clearly comes within the meaning of this phrase as it is employed in the sections of the Shops Acts in which it occurs. The case finds "she had plenty of time for her lunch, subject to possible interruptions. She gets about six orders a day." The present case is certainly not one of special hardship. But the Act is of universal application; and no discretion is given to the magistrate to deal with special cases. In my opinion the case should be answered by stating that the learned magistrate was right in his determination.

PIM J. :—

I agree. It has been suggested that the Legislature can never have intended to give to the word "shop" the extended meaning which our decision involves. I do not think that is so. In the first clause of sect. 19 (the interpretation section) the word used is "includes" and not "means." This is not a natural use of the word "include," and, so far as this Court is concerned, the word "mean" would have been of equal force. Why has it been used? It seems to me to point to the fact that the Legislature meant to give an extended and unnatural meaning to the word "shop," a meaning that went far beyond the popular and recognized meaning of the word.

In the arguments addressed to us, almost all the Acts which were repealed and codified by the Shops Act of 1912 were referred to, and their sections were analyzed. It was, perhaps, necessary to do this in order to enable the Court to arrive at the mind and

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K. B. Div. meaning of the Legislature, but in fact all discussion began and ended with sect. 19.

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I agree with Madden J. that the case hinges on the meaning to be given to the words "retail trade" in that section, for wherever retail trade is carried on, there is to be found a shop for the purposes of the Act.

Now, what is retail trade? In the case of *Treacher & Co., Ltd., v. Treacher* (1), Vice-Chancellor Bacon points out the two main elements of retail trade. First, that the goods should be sold directly to the customer, and secondly, that they should not be sold in bulk but in relatively small quantities. A third element has been suggested by some writers, namely, that the goods shall be distributed, but although the retailer is wider in his distribution than the wholesale merchant, they are both distributors.

Now, let me apply these criteria to Messrs. Wallace's business. Messrs. Wallace deal directly with customers—that is not denied. Do they deal in bulk or in small quantities? "Small" and "large" are relative terms. They depend on the thing in connexion with which they are used. In the matter of coal, half a ton may be large in mere size, but qua coal and the sale of coal, it is small. In the coal trade it is relatively as small as a dozen of eggs or a pound of butter is in the grocery trade. From the point of view of the coal merchant it cannot be denied that Messrs. Wallace deal in small quantities.

I have no doubt that a retail trade is carried on by Messrs. Wallace in their office in D'Olier Street, and it follows that their office is a "shop" for the purpose of the Shops Act, 1912. It may be a painful thing to them to hear their office called a shop. They must take comfort from the fact that it is only a shop for the purposes of an Act of Parliament.

However, what we have to deal with is, not the office in D'Olier Street, but the sub-office in Rathmines. There is no coal there, nor any sample of coal, nor even any coal stores connected therewith. There is nothing there except a lady and

a counter, and it was argued that it would be absurd to call it a shop. I agree, but the Act of Parliament says it is a shop. In the case of *Stallard v. Marks* (1) the very same condition of things existed. Messrs. Stallard, who were merchants in Worcester, took an office in Cheltenham, and put up a notice therein with their names thereon as distillers, wine merchants, and brewers, Worcester. They were not licensed for sale by retail in Cheltenham, and they had no spirits on the premises. Customers gave orders, and the goods were forwarded to them from Worcester. Messrs. Stallard were convicted by the magistrates of carrying on trade in spirits by retail in Cheltenham without a licence, and the Court of King's Bench upheld the conviction. In my opinion there is no distinction between that case and the present one so far as retail trade is concerned. If it was retail trade in Cheltenham, it is retail trade in Rathmines.

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The only other point is whether the young lady who took the orders is a shop-assistant. Section 19 says that the expression "shop-assistant" means any person wholly or mainly employed in a shop in connexion with the serving of customers, or the receipt of orders. The words "or the receipt of orders" seem to me redundant, for a person in receipt of orders is certainly employed in connexion with the serving of customers. Whether the words are merely explanatory of what goes before, or whether they constitute a separate class, does not matter. In either case Miss Margaret W. Smith comes within their ambit.

In my opinion the decision of the magistrate was right.

Solicitor for the appellants: *Douglas Ampleford*.

Solicitor for the respondent: *W. J. Shannon & Co.*

A. E. C.

(1) 3 Q. B. D. 412.

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R. (WALSH) v. TIPPERARY JUSTICES (1).

Jan. 12. *Justices — Jurisdiction — Petty Sessions — Form of Order — Dismiss — Case outside the Petty Sessions Act — Omission to state whether dismiss “without prejudice” or “on the merits” — Res judicata — Petty Sessions (Ireland) Act, 1851 (14 & 15 Vict. c. 93), ss. 21, 42 — Game Act (27 Geo. 3, c. 35), s. 10.*

The procedure laid down by sect. 21 of the Petty Sessions (Ireland) Act, 1851 (14 & 15 Vict. c. 93), is not obligatory in the case of a dismiss under the Game Act (27 Geo. 3, c. 35), and an order of the justices, made under that Act, stating that a charge is “dismissed,” without adding “on the merits” or “without prejudice,” is a good order, and a bar to subsequent proceedings for the same offence.

R. (Bridges & Ram) v. Armagh Justices, [1897] 2 I. R. 236, considered.

CERTIORARI.

Application to make absolute a conditional order of certiorari to quash a conviction at the Thurles Petty Sessions on the 11th November, 1916. The prosecutor, Richard Walsh, was summoned to appear at the Petty Sessions Court held at Thurles in the county of Tipperary, on the 7th October, 1916, to answer a complaint that on Friday, the 29th September, 1916, at Lolagh, otherwise Liskeveen, he unlawfully entered the lands of the complainant Margaret Louisa Mansergh Going, in pursuit of game, contrary to 27 Geo. 3, c. 35, sect. 10. The justices, having heard the case and gone into evidence, made an order “that the complaint is dismissed.” Subsequently, on the 9th November, 1916, the prosecutor was served with another summons or complaint at the suit of the same complainant, charging him with the same offence. Upon the hearing of this second summons it was contended on behalf of the prosecutor that, having regard to the former order of the justices, the matter was *res judicata*; but the solicitor for the complainant contended that, having regard to the form of their order, viz., “dismissed,” the order was a nullity, and, therefore, no bar to further proceedings. The solicitor for the

prosecutor thereupon withdrew and took no further part in the proceedings. The justices, however, heard the case and made an order to the following effect:—"Defendant is convicted of the said offence and ordered to pay for fine the sum of twenty shillings in four weeks' time, and in default of payment to be imprisoned in Limerick Jail for the period of fourteen days without hard labour, unless said sum be sooner paid."

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On the 30th November, 1916, a conditional order to quash the conviction was made, on the application of the prosecutor, on the following grounds:—

1. That the order dated the 11th November, 1916, was made without and in excess of jurisdiction.

2. That the said order was made without and in excess of jurisdiction, as the matter of said complaint was *res judicata*.

3. That the said order is bad on its face, as it charged several offences, and it is uncertain upon which the conviction purports to have been made.

4. That the said order is bad on its face in convicting the defendant generally of distinct offences charged conjunctively.

5. That the said order is bad in not specifying distinct fines for each conviction.

Murnaghan, for the prosecutor:—

The conviction, dated 11th November, 1916, is in excess of jurisdiction, as the order of "dismiss," dated 7th October, 1916, was a final order and valid under the Act 27 Geo. 3, c. 35. The observations of O'Brien J. in *R. (Bridges & Ram) v. Armagh Justices* (1) are obiter dicta.

[Gibson J. referred to *R. (McDonnell) v. Justices of Tyrone* (2).]

In *R. (Bridges & Ram) v. Armagh Justices* (1) the terms of sect. 42 of the Petty Sessions Act were not considered. The form of order is not a form of procedure, but deals with rights. Sect. 21 of the Petty Sessions Act is expressly excepted by the language of sect. 42. The authority of *R. (Bridges & Ram) v. Armagh Justices* (1) is cut into by the decision in *R. (Kane) v. Tyrone Justices* (3):—O'Connor's Justice of the Peace, vol. i, 199 (n).

(1) [1897] 2 I. R. 236. (2) [1912] 2 I. R. 44. (3) 40 I. L. T. R. 181.

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Dismiss was an order of acquittal under the law previous to the Petty Sessions Act where there was a hearing on the legal merits: *O'Connor's Justice of the Peace*, vol i, p. 257.

The conviction is bad on its face. Several offences are charged in the summons: *R. (M'Carron) v. Donegal Justices* (1), and the conviction is for "the said offence," and is uncertain. The rule that several convictions can be made in the one order does not apply: *R. (Burrowes) v. Justices of Cavan* (2).

Mark Cooper, for the complainant in the summons:—

The intention of the Legislature was to assimilate the procedure under the Game Acts to the ordinary Petty Sessions procedure. This was done by sect. 42 of the Petty Sessions Act. The word "may" in this section is mandatory and should be read "must."

Where a power is conferred, a duty to exercise it may be coupled with it, which would render the power imperative: *Julius v. Bishop of Oxford* (3); *Maxwell on Statutes*, 1912 ed., 405; *Re Baker* (4). Enactments regulating the procedure in Courts seem usually to be imperative and not directory: *Maxwell*, 604. Sect. 42 of the Petty Sessions Act, 1851, when read with sect. 21, makes it compulsory on the justices when adjudicating to adopt the forms of procedure prescribed by sect. 21, and to state whether a dismiss is "on the merits" or "without prejudice." *R. (Bridges & Ram) v. Armagh Justices* (5) is a definite decision on this point. An order simply dismissing the complaint without stating whether it was on the merits or without prejudice is invalid, and is no bar to subsequent criminal proceedings: *Great Southern and Western Railway Co. v. Darby* (6); or to civil proceedings: *Donnelly v. Ingram* (7). *O'Connor's Justice of the Peace*, 1915 ed., 175. The Petty Sessions Act, 1851, applies to the forms of procedure applicable to prosecutions under the Game Act: per *Gibson J.*; *R. (M'Donnell) v. Tyrone Justices* (8). The decision in *Lawless v. M'Aleer* (9) was on a question of

(1) [1907] 2 I. R. 386.

(2) [1914] 2 I. R. 150.

(3) 5 A. C. 214.

(4) 44 Ch. D. 262.

(5) [1897] 2 I. R. 236.

(6) [1892] 27 I. L. T. R. 45.

(7) 31 I. L. T. R. 139.

(8) [1912] 2 I. R. 44.

(9) [1897] 2 I. R. 248.

jurisdiction, not of procedure. The jurisdiction conferred on justices under the Game Act was not affected by the Petty Sessions Act. The latter statute only prescribed the procedure to be followed. The conviction of "said offence" was right: *R. (Burrowes) v. Cavan Justices* (1).

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Cur. adv. vult.

GIBSON J. :—

Jan. 19.

Three questions have been discussed for decision :—

1. Does sect. 21 of the Petty Sessions Act apply to a dismiss under the Game Act (27 Geo. 3, c. 35) ?

2. If sect. 21 applies to such dismiss, does an omission to state whether the dismiss is on the merits or without prejudice make such dismiss a nullity on its face void ?

3. Is the conviction comprising several offences in form invalid because it convicts of "the said offence" instead of "the said offences" ?

1. The Petty Sessions Act (subject to the exception in sect. 42) is of general application as to procedure and forms, which latter, as regards the order-book, could be altered formerly under sect. 36, and now under 41 & 42 Vict. c. 69, sect. 11. Sect. 42, on which the question for determination depends, expressly excludes from the operation of the Act certain statutory proceedings, including those under the Game Act, except that all such excluded proceedings "may be in the forms of procedure required by the Act." The power to dismiss without prejudice was first given by the Petty Sessions Act. It is not found in 12 & 13 Vict. c. 70. Up to 1851 a dismiss under 27 Geo. 3, c. 35, would have been a complete acquittal, and if the words "without prejudice" had been added they would have been without effect: *Great Southern and Western Railway Co. v. Gooding* (2). Does the expression "forms of procedure" in sect. 42 bring in sect. 21, and thereby alter the previous law, and take away the defendant's right to a clean acquittal? The negative language in sect. 42, and its affirmative and apparently permissive phraseology as to forms (to be read in connexion with sect. 36), seem to me to indicate that forms and not rights were intended to be dealt with. There are no doubt

(1) [1914] 2 I. R. 150.

(2) [1908] 2 I. R. 429.

K. B. Div. dicta the other way, but their weight is much affected by the
 1917. exact terms of sect. 42 not having been considered. There are,
 R. on the other hand, three decisions in favour of the construction that
 (WALSH) I adopt. In an unreported case referred to by Mr. Murnaghan,
 v. this Court held that, notwithstanding the Petty Sessions Act
 TIPPERRARY and the form of the prescribed statutory order-book, costs could
 JUSTICES. not be given in respect of a conviction under the Game Act.
 Gibson J. In *Lawless v. M'Alcer* (1), a Revenue prosecution, it was apparently
 assumed that but for 20 & 21 Vict. c. 40, sect. 6, a dismiss without
 prejudice would have been an improper order. A case more
 directly in point is *R. (M'Donnell) v. Justices of Tyrone* (2),
 the ratio decidendi of which appears from comparing the argument
 of Mr. Murnaghan with the judgments. The contention of the
 applicant was that withdrawal of a game prosecution was per se
 tantamount to a dismissal, which, as sect. 21 of the Petty Sessions
 Act did not apply, must be a dismissal on the merits as final.
 I accepted the view that the dismiss was unaffected by sect. 21.
 The judgment of the Lord Chief Baron does not specifically
 refer to the point, but it assumes that a dismiss under the
 Game Act was conclusive. The withdrawal was not based on
 any compromise, and if the Petty Sessions Act, sect. 21, had
 applied, a mere withdrawal would have much more plausibly
 supported the inference of a dismiss without prejudice than
 a dismiss on the merits. If sect. 21 governed, there would have
 been nothing to argue. This case I regard as a direct authority
 on the present controversy. If prima facie the withdrawal did not
 point to a D.W.P., it would comprehend either D.O.M. or D.W.P.,
 which would leave the adjudication open to possible objection for
 uncertainty on a point not suggested. The whole case pivoted on
 a Game dismiss being final and outside the Petty Sessions Act.

Boyd J. did not give any independent judgment, but I understood that all the Court were agreed as to the nature of a Game prosecution dismiss. I am of opinion, as I was then, that when the first prosecution was dismissed jurisdiction was exhausted, and that the offence ceased to be justiciable. In the present prosecution the complainant does not sue as a common informer, which makes the case stronger.

(1) [1897] 2 I. R. 248.

2) [1912] 2 I. R. 44.

The second and third questions do not therefore require at present to be decided, but as to them I would add the following observations. I do not think the ex parte case (*Great Southern and Western Railway Co. v. Darby*) (1) or the recent decision (*Donnelly v. Ingram*) (2) (the latter distinguishable, as is shown by *Reed v. Nutt* (3)), can be taken as settling the law that a dismiss simpliciter is made a nullity by sect. 21 of the Petty Sessions Act, which is analogous to the provision in the Civil Bill Act. That such dismiss awarding costs should be void, so as to expose the party executing it to an action, would be a grave matter, and it may be worth consideration whether the enactment might not be deemed directory, or whether oral evidence might not be admissible, as in *Reed v. Nutt* (3), supra; or whether the decision should not be at first put out of the way by certiorari; or whether a mandamus to hear and determine might not be the proper remedy in dealing with the omission. As to the conviction referring to "the said offence" in the singular, I doubt if *R. v. Co. Down Justices* (4), a one-sided decision, can be taken as conclusive. It was on a different statute, and the decision, to which I was a party, might have been otherwise if the reasoning in *R. v. Justices of Cavan* (5) had been considered. "Said offence" ought to be read as *nomen collectivum*, embracing everything in the complaint, and not as describing only one of several offences, which would make the conviction uncertain. I express no opinion on either of the other questions, 2 and 3, but think it desirable to add what I have said by way of caution should these points afterwards come up for determination.

KENNY J. :—

I concur. The Acts relating to the preservation of game in Ireland are outside of the Petty Sessions Act, with one possible exception, namely that the proceedings under the former may be in the forms of procedure required by the latter Act, and in my opinion the substantial if not the only question for our determination is whether the word "may" in that section should be construed as

(1) 27 I. L. T. R. 45.

(2) 31 I. L. T. R. 139.

(3) 24 Q. B. D. 669.

(4) 42 I. L. T. R. 111.

(5) [1914] 2 I. R. 150.

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—
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K. B. Div. equivalent to "must" or "shall." If the forms of procedure
 1917. under the Petty Sessions Act be mandatory, or, at least,
R. directory, the 21st sect. of the Act would be applicable. But
 (WALSH) throughout the Petty Sessions Act the Legislature was careful to
v. use the word "shall" when an obligatory act or form was con-
 TIPPERARY tempted, and the words "may" or "it shall be lawful" when a
 JUSTICES. discretion was intended to be conferred. In the 21st sect., which
 — provides for two forms of dismissal, namely "on the merits" and
 Kenny J. "without prejudice," the action of the justices is rendered
 directory, if not indeed mandatory, by the use of the word
 "shall." There is no option for them but to make the order
 authorized by the particular Statute under which the complaint is
 made, or to dismiss the complaint either "on the merits" or
 "without prejudice." If the complaint be dismissed, the order
 book is to state whether the dismissal is "on the merits" or
 "without prejudice" to a further complaint. The 42nd section,
 by the use of the word "may," in my opinion clearly abandons
 the imperative language, and leaves it open to the magistrates
 to apply either the procedure under the Petty Sessions
 Act or that which might be adopted in case the Game Acts
 were altogether outside the Petty Sessions Act. If they
 be not governed by the Petty Sessions Act, the order of dismissal
 amounts to an acquittal, and in form and substance is a good
 order. In my judgment there are no circumstances in the case,
 founded on context or otherwise, which would justify us in con-
 struing "may" as "shall," and the order of the 7th October,
 1916, amounted to a determination and adjudication by the
 justices of the matter of complaint, and afforded a complete
 defence to the second summons.

GORDON J.:—

I have nothing material to add to the judgments which have
 just been delivered.

In the view I take of the case I do not consider it necessary to
 express any opinion as to the effect of a dismiss simpliciter in
 proceedings to which the Petty Sessions (Ireland) Act, 1851,
 applies, or as to the form of the conviction on the second summons.
 If the Petty Sessions (Ireland) Act, 1851, applied, these questions

would have to be considered. But I do not think that Act does apply to the form of order made by the justice or justices in a prosecution under 27 Geo. 3, c. 35. Under that Act there was in my opinion no power to make an order dismissing the complaint without prejudice; and if the Petty Sessions Act applied, this could be done: a change which would affect rights as distinguished from mere form of procedure, the latter being all that the Petty Sessions Act says *may* be adopted in any information, or complaint, or other proceeding relating to the preservation of game. Even if the word "may" in sect. 42 of the Petty Sessions Act is to be read as mandatory, which I do not say it is, this would only affect forms of procedure and not matters involving rights of the parties.

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Gordon J.

I therefore consider that a dismiss simply was a good adjudication under the statute in pursuance of which the complaint was brought, and that it must be taken to have the same meaning as "dismiss on the merits," unless it can be shown from the proceedings themselves, or in some other conclusive way, that the merits of the case had not been gone into; and there is nothing here to show this.

For these reasons I am of opinion that the unappealed from order of 7th October, 1916, disposed of the complaint, and that the order of 11th November, 1916, which was based upon the same facts and on the same complaint as in the first summons, was invalid and cannot be sustained.

Solicitor for the prosecutor: *Francis O'Connor*, Thurles.

Solicitor for the complainant in the summons: *Allen H. Morgan*, Thurles.

A. E. C.

K. B. Div.
1917.

YOUNG v. MEAD.

Jan. 31.
Feb. 9.

Practice—Set-off—Costs—Solicitor's Lien—Independent Proceedings in King's Bench Division and in King's Bench Division (Bankruptcy)—Jurisdiction to allow Set-off—R. S. C., 1905, Or. 65, r. 18.

The plaintiffs brought an action in the King's Bench Division against the defendant, and obtained judgment against him for £65 and costs £57 11s. 8d., making in all the sum of £122 11s. 8d. Subsequently the plaintiffs brought a debtor's summons in the King's Bench Division (Bankruptcy) claiming the said sum of £122 11s. 8d. The debtor's summons was dismissed, with costs amounting to £40 11s. 7d. On an application in the King's Bench Division (Bankruptcy) by the defendant's solicitors for a charging order on the said sum of £40 11s. 7d., and a cross-application by the plaintiffs asking for liberty to set off the said sum of £40 11s. 7d. against an equal portion of the sum and costs recovered in the action :

Held, that the Court had a discretion to allow a set-off.

Held, also, that the Court ought to allow the set-off, notwithstanding the defendant's solicitors' lien.

Reid v. Cupper, [1915] 2 K. B. 147, and *Puddephatt v. Leith*, [1916] 2 Ch. 168, followed.

NOTICE OF MOTION applying for a charging order ; Cross-notice of Motion for a set-off.

The following statement of the facts is taken from the judgment of Pim J. :—

In January, 1915, James A. Young and Susan A. Young brought an action in the King's Bench Division against Allen Phillips Mead, a lieutenant in His Majesty's army, claiming a sum of £65 for the price of a horse sold by them to him. At the time the sale took place Allen Phillips Mead was an infant, and in his defence he pleaded infancy. He had, however, attained age before the writ was served ; and at the trial, which took place in June, 1915, he withdrew his plea of infancy, and, the jury having found for the plaintiffs, the Court gave judgment for them for £65 with costs, which were afterwards taxed to £57 11s. 8d., making in all the sum of £122 11s. 8d.

Allen Phillips Mead never paid any part of the said sum for

which judgment was given, and, on more than one occasion, he frankly admitted that he had no money whatever, and was quite unable to pay any part of the sum due.

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He was represented in the action in the King's Bench Division by Messrs. Barrington & Son, and the plaintiffs were represented by Messrs. Brown & M'Cann.

On the 22nd of September, 1915, the Youngs, having failed to recover anything from Lieutenant Mead, issued a debtor's summons against him, calling for payment of the said sum of £122 11s. 8d.

On the 11th of October, 1915, Lieutenant Mead applied to have the said debtor's summons dismissed; and on the 29th of October, 1915, Mr. Justice Boyd made an order dismissing the summons, with costs.

An appeal was brought by the Youngs against the order of Mr. Justice Boyd, and on the 29th of October, 1915, the Court of Appeal confirmed the order and dismissed the appeal, with costs (1).

Lieutenant Mead was represented in the bankruptcy proceedings by Messrs. Moore, Keily, & Lloyd, who were fully aware of the action in the King's Bench Division, of the judgment that had been obtained and entered, of the position of Lieutenant Mead, and of his total inability to meet his debts. All this they knew before they appeared for him in the bankruptcy proceedings.

The costs of the proceedings before Mr. Justice Boyd and the Court of Appeal were taxed and certified by the taxing master at the sum of £40 11s. 7d.

The present application was made under the 3rd section of the Legal Practitioners (Ireland) Act (39 & 40 Vict. c. 44) by Messrs. Moore, Keily, & Lloyd, asking for a charging order upon the said sum of £40 11s. 7d., as being recovered by them in the action. The plaintiffs, the Youngs, served a cross-notice, asking for liberty to set off the said sum of £40 11s. 7d. against an equal portion of the sum of £65, the amount of the judgment debt recovered in the action in the King's Bench Division, or in the alternative, an equal portion of the sum of £57 11s. 8d., the taxed costs of the said action.

(1) See *In re Mead*, [1916] 2 I. R. 285.

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Oliver Murphy, for the applicants for the charging order :—

Order 65, Rule 18, does not apply to a set-off as to costs in independent proceedings: *David v. Rees* (1); *Edwards v. Hope* (2). This was recognized by the general orders of 1832 and 1834, and by general order of 1854, No. 117, which expressly provided that the set-off was not to prejudice the solicitor's lien. These orders are, no doubt, abrogated by the rules made under the Judicature Act, but the Court will follow the old practice, and not allow a set-off to affect the solicitor's lien: *Edwards v. Hope* (2), *supra*. *Johnston v. M'Kenzie* (3) is the last case dealing with the subject in Ireland, and the judgment of Gibson J. recognizes that the solicitor's lien is paramount to the set-off.

In any case the rule as to set-off was never recognized in bankruptcy: *In re Bassett, Ex parte Lewis* (4); *Ex parte Griffin* (5). Bankruptcy proceedings are of a very special character, and affect the status of the debtor. It is only just, therefore, that the debtor's solicitor should be protected and encouraged to defend his client's status. If the debtor in the present case had been made a bankrupt, very serious consequences would have ensued, as he is an officer in His Majesty's army. The plaintiffs made an untenable claim in the bankruptcy proceedings, which they failed to substantiate, and they must bear the consequences.

Cecil Fforde, for the plaintiffs :—

I do not dispute the claim of defendant's solicitor to a charging order on the costs awarded to their client in the bankruptcy matter and appeal; but the Court will not make such an order, with liberty to execute, if the plaintiff has the right to set off the costs or the amount of the judgment awarded him in the King's Bench action against the costs in the bankruptcy proceedings. The right to such set-off depends upon the old common-law jurisdiction of the Courts and is purely a matter of discretion: *David v. Rees* (1). It is a discretion quite independent of the right of set-off conferred by R. S. C. Order 65, Rule 18, and the modern tendency in all Courts is to allow the set-off in all cases where, as between

(1) [1904] 2 K. B. 435.

(2) 14 Q. B. D. 922.

(3) [1911] 2 I. R. 118.

(4) [1896] 1 Q. B. 219.

(5) 14 Ch. D. 37.

the parties, it would be fair and just to do so, and no fraud or imposition has been practised on the solicitor by collusion between the parties: *Puddephatt v. Leith* (1).

In *Johnston v. M'Kenzie* (2) the only question actually before the Court was the right of a solicitor to a charging order. There was no cross-application for liberty to set off; and so far as this case is an authority for the proposition that it is an inflexible rule of the King's Bench to refuse to allow a set-off to the prejudice of a solicitor's lien, it has been overruled by *Reid v. Cupper* (3). Lord Justice Vaughan Williams in *In re Bassett, Ex parte Lewis* (4) based his judgment against allowing a set-off in bankruptcy on the then practice of the Chancery Division; but the practice is now in the opposite direction: *Puddephatt v. Leith* (1).

In the present case the equities are exceptionally strong in favour of the set-off. The defendant's solicitors were not the solicitors in the original action. They took up the bankruptcy proceedings with full knowledge of their client's insolvent condition, and of the fact that he had already repudiated a judgment debt, and expressed his inability to pay the amount of either the debt or costs. "If a solicitor says, 'Unless I have a lien, I cannot get paid,' the answer is, he should see before he undertakes a particular business for a client that the client is able to pay him for it": Jessel M.R., in *Pringle v. Gloag* (5), quoted with approval in *M'Cormack v. Ross* (6) and in *Puddephatt v. Leith* (1). [He also referred to *Goodfellow v. Gray* (7), *Rath v. M'Mullan* (8), and *Meynell v. Morris* (9).]

Cur. adv. vult.

PIM J.:—

Feb. 9.

[His Lordship dealt with the facts as set out above, and proceeded.]

Now there is no doubt that, in law, Messrs. Moore, Keily, & Lloyd are entitled to the charging order they ask for; but it by no means follows that the Youngs have not a right of set-off, as

(1) [1916] 2 Ch. 168.

(2) [1911] 2 I. R. 118.

(3) [1915] 2 K. B. 147.

(4) [1896] 1 Q. B. 219.

(5) 10 Ch. D. 676, 680.

(6) [1894] 2 I. R., at p. 555.

(7) [1899] 2 Q. B. 498.

(8) [1916] 1 I. R. 349.

(9) [1911] 104 L. T. 667.

K. B. D. against the costs to be charged, in effect paramount to the solicitors' claim.

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The law on the matter in this country seems to be exactly the same as the law in England; but almost all the decisions have come from the other side of the water.

The history of the right to set off, where it affects a solicitor's lien, is a curious one. Previous to 1832, there seems to have been an equitable jurisdiction in all the Courts to order a set-off. It was in all the Courts a question of discretion. In 1832 a general regulation was passed in England to the following effect:—

“No set-off of damages or costs between parties shall be allowed to the prejudice of the attorney's lien for costs in the particular suit against which the claim of set-off is sought; Provided, nevertheless, that interlocutory costs in the same suit awarded to the adverse party may be deducted.”

By the English General Orders of 1853, the above rule was reproduced. Under the General Orders of 1854, a rule in identical terms was made for Ireland.

This condition of things existed down to the making of the rules under the Judicature Acts, when the rule which is contained in England, in Order 65, Rule 14, and in Ireland, in Order 65, Rule 18, was made as follows:—

“A set-off for damages or costs between parties may be allowed, notwithstanding the solicitor's lien for costs in the particular cause or matter in which the set-off is sought.”

The meaning of this rule was considered by the English Court of Appeal: first in the case of *Edwards v. Hope* (1), and again in *David v. Rees* (2). The effect of the decisions in these two cases is, first, that the set-off, if allowed, may be made subject to the solicitor's lien; and, secondly, that a set-off of costs, though not of damages, is confined to cases in which the costs sought to be set off against each other are in the same action or proceeding, and does not extend to cases in which the judgments for costs are in distinct and independent litigations.

After the decision in *David v. Rees* (2) doubts arose as to its correctness, but the matter did not come before any Court of equal

(1) 14 Q. B. D. 922.

(2) [1904] 2 K. B. 435.

jurisdiction until the year 1914, when the case of *Reid v. Cupper* (1) was argued before the Court of Appeal in England. In that case the plaintiff brought an action against the defendant for slander, and the defendant recovered judgment with costs. The plaintiff subsequently brought an action against the defendant to recover damages for assault, wrongful dismissal, and false imprisonment, in which he recovered a verdict and judgment with costs. An application was made to Mr. Justice Scrutton, who tried the second action, for an order that the costs payable by the plaintiff in the first action should be set off as against the costs payable by the defendant in the second action, and Mr. Justice Scrutton made an order to that effect. The matter was brought to the Court of Appeal; and the Court, while admitting that they were bound to follow the case of *David v. Rees* (2), expressed great doubts as to the correctness of that decision. All the cases on the point in question were cited to the Court, and exhaustively analysed. It was argued, as in *David v. Rees* (2), that Rule 14 of Order 65 of the General Orders did not extend to separate proceedings; but the Court held that, inasmuch as the earlier General Orders of 1832 and 1853 had gone, the old discretion which existed before 1832 remained in the Courts, and that it did not matter whether Order 65, Rule 14, applied or not. "If it applies," said Lord Justice Phillimore, "we have discretion; if it does not apply, then, under the old rule, we have discretion." "With regard to the second point," said Lord Justice Pickford, "namely, that, under the circumstances, the case has to rest on the old jurisdiction as to costs, I agree; but with regard to the second part of the proposition, that according to the old jurisdiction of the Courts this lien must be allowed, I do not agree"; and the learned Lord Justice proceeded as follows:—"I think the result of the old jurisdiction was that the Courts had a discretionary power to allow this set-off, and a discretion as to the terms on which they would allow it. The Court of King's Bench decided to exercise its discretion in one particular way; the Court of Common Pleas laid down a different and directly opposite rule; the Court of Chancery exercised its discretion in the same way as the Court of King's Bench; and the

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(2) [1904] 2 K. B. 435.

K. B. Div. Court of Exchequer exercised its discretion according to circumstances. The different Courts exercised their discretion in different ways. In *Edwards v. Hope* (1) the Court of Appeal expressly decided the point that the Courts in exercising the old jurisdiction exercised it with discretion as to the terms on which it was to be exercised. I thoroughly agree that we are bound by the decision in *David v. Rees* (2). In this case the learned judge has exercised his discretion; and it has hardly been challenged that it was a perfectly proper exercise of his discretion. The reason for thinking so could not be put better than in the admirable way in which it was put by Kay J. in *Blakey v. Latham* (3), that there might be great injustice in a case where the client is not able to pay if the successful defendant in the first action were made to pay the plaintiff's solicitor's costs in the second action, which the plaintiff ought to pay himself."

So far as the cases to which I have referred go, they only formulate the principles governing the Court of King's Bench, but, in the case of *Puddephatt v. Leith* (4), a precisely similar question came before Mr. Justice Younger in the Chancery Division, and it was argued that, whatever might be the powers of the King's Bench Judges with respect to set-off in their Courts, the practice of the Court of Chancery had been settled, and settled the other way. Mr. Justice Younger, in a very clear and learned judgment, refused to accept that argument, and held that there was a discretion in the Court of Chancery, similar in every respect to the discretion existing in the Common Law Courts. "Such a state of things," he said, "if correct, would, I think, be intolerable." He refused to follow *Blakey v. Latham* (3) and *Bake v. French* (5), in which cases Mr. Justice Kay and Mr. Justice Parker, expressing great regret, and giving strong reasons against doing what they felt compelled to do, decided that they had no power to allow a set-off. Mr. Justice Younger held that the case of *Reid v. Cupper* (6) had released him from the apparent slavery to which the earlier cases seemed to condemn the Court of Chancery, and he

(1) 14 Q. B. D. 922.

(2) [1904] 2 K. B. 435.

(3) 41 Ch. D. 518.

(4) [1916] 2 Ch. 168.

(5) [1907] 1 Ch. 428.

(6) [1915] 2 K. B. 147.

refused to follow them. He quoted Lord Justice Pickford's judgment in *Reid v. Cupper* (1) with approval, and he more especially quoted the following words from Mr. Justice Kay in *Blakey v. Latham* (2):—"If the case were absolutely free from authority, I confess it seems to me difficult to see why the solicitor's lien should intercept the right. Take the simplest case one can imagine. *A* brings an action against *B*, and it is dismissed with costs. *B* brings another action against *A*, and that is dismissed with costs. The order in each case is, *A* to pay *B* his costs in the one action, and *B* to pay *A* his costs in the other action. Well, when those costs are taxed, and the Master's allocatur is issued, there is a judgment in each case for a definite amount, and there is no doubt whatever that those judgments could be set off one against the other. That being so, just suppose the case (which is the only case in which the matter becomes the least material) that one of those parties, *A*, was insolvent and unable to pay anything, why *B* should pay costs to *A*, for the sake of *A*'s solicitor, is what I cannot understand. I cannot see how there could be any equity for that"; and having quoted certain words of Lord Chief Justice Cockburn in *Mercer v. Graves* (3), Kay J. added, "How can *A*'s solicitor possibly have an equity against *B*, to make *B* pay the costs which *B* is ordered to pay to *A*, when *B* cannot recover from *A* the costs which *A* is ordered to pay to *B*? How can *A*'s solicitor have an equity to make *B* pay instead of setting them off? If this matter were free from authority, I should say that this was the most extraordinary equity I ever heard of." But Mr. Justice Younger, towards the end of his judgment, put the matter on broader grounds. He said: "The change which was made by Order 65, Rule 14, shows that the old views with regard to the sanctity of a solicitor's lien no longer obtain." He quoted the following words of Sir George Jessel in *Pringle v. Gloag* (4):—"It appears to me that it would be a monstrous extension of the rights of a solicitor against the parties to an action to say that he should have the right to make the party who may have been successful in the ultimate result pay the losing party's costs; and unless I found an authority so deciding I should decline to accede

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(1) [1915] 2 K. B. 147.

(2) 41 Ch. D. 518.

(3) L. R. 7 Q. B. 499.

(4) 10 Ch. D. 677.

K. B. Div. to any such proposition." If a solicitor says, "unless I have a
 1917. lien I cannot get paid," the answer is, "he should see before he
 YOUNG undertakes a particular business for a client, that that client is
 v. able to pay him for it. A solicitor is not compelled to work
 MEAD. for an insolvent client"; and he summed up as follows:—
 Pim J. "The result, I think, is that, *prima facie*, a set-off should not,
 owing to such a lien, be refused if, as between the parties
 themselves, it would be fair and just to allow it, and if no fraud
 or imposition had been practised on the solicitor by collusion
 between them."

I can only say that I absolutely and entirely concur with Mr. Justice Younger's reasoning from beginning to end.

The only other point that I have to decide is one argued by Mr. Murphy, namely, that there is some difference between costs in the Court of Bankruptcy and other costs. He referred me to a statement made by Lord Justice Vaughan Williams in *In re Bassett, Ex parte Lewis* (1), in which the learned Lord Justice gave as a reason for refusing to allow a set-off between costs incurred in a common-law suit and costs incurred in bankruptcy, that proceedings in bankruptcy are very special proceedings, and may have the effect of altering a debtor's status, and that, therefore, it was not unreasonable that the costs of such proceedings should be kept distinct, and not allowed to be set off. Lord Justice Vaughan Williams had, in the earlier part of his judgment, following *Blakey v. Latham* (2) and *Edwards v. Hope* (3), refused to allow a set-off between costs incurred in the common-law side and costs incurred in the Court of Bankruptcy. But the arguments used in that case, both by the counsel and by the learned judge, were exactly the same, with the exception of the few words on which Mr. Murphy relied, as were used in all the other cases which have been quoted. The Court of Bankruptcy, although it is now part of the King's Bench Division, in earlier days followed the practice of the Court of Chancery in the matter of a set-off, as it indeed did in other respects; and, in consequence of such practice, costs in bankruptcy matters were rarely, if ever, set off as against costs incurred in another Division.

(1) [1896] 1 Q. B. 219.

(2) 41 Ch. D. 518.

(3) 14 Q. B. D. 922.

I do not think the application of the rule ever depended upon the reason given by Lord Justice Vaughan Williams, nor do I think the learned Lord Justice himself meant to suggest that it did. I think the Lord Justice was merely attempting to justify a state of things which he, in his legal heart, was inclined to condemn.

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I think it would be altogether unfair and inequitable to make James A. Young and Susan A. Young pay not only their own costs, but the costs of the solicitor of the party against whom they have obtained judgment; and, following the law as laid down by the Court of Appeal in England in the case of *Reid v. Cupper* (1), and by Mr. Justice Younger in the case of *Puddephatt v. Leith* (2), I must refuse the application of Messrs. Moore, Keily, & Lloyd, and grant the application of James A. Young and Susan A. Young, and declare that they are at liberty to set off the sum of £40 11s. 7d., costs due by them, against an equal portion of the sum of £57 11s. 8d., costs due to them.

Solicitors for the plaintiffs: *Brown & McCann*.

Solicitors for the defendant: *Moore, Keily, & Lloyd*.

D. M. S.

(1) [1915] 2 K. B. 147.

(2) [1916] 2 Ch. 168.

Appeal.
1916.
June 9.

THE RIGHT HON. HIS MAJESTY'S ATTORNEY-GENERAL
FOR IRELAND, INFORMANT, v. STEPHEN ADAMS,
DEFENDANT.

Revenue—Increment Value Duty—Owner of Land—Transfer of Land prior to Assessment of Provisional Valuation—Finance (1909-10) Act, 1910, ss. 1, 2, 4, 26, 27, 41 (10 Ed. 7, c. 8).

It is no answer to a claim for increment value duty arising on the occasion of a transfer on sale of an interest in land in pursuance of a contract made after the commencement of the Finance Act, 1910, that no provisional valuation of the land had been made by the Commissioners of Inland Revenue prior to, or at the date of, the sale. In such a case it is the duty of the commissioners, under sect. 27 of the Act, to serve notice of the provisional valuation on the owner of the land as defined by sect. 41 of the Act; not on the transferor, although the duty is assessable on the latter.

This was an appeal by the defendant against an order, dated the 15th December, 1915, of the King's Bench Division, Madden, Boyd, and Dodd JJ., affirming the judgment of Palles C.B., at the trial in favour of the informant. The action was tried by Palles C.B. without a jury, on the 17th June, 1915. It was in the nature of an information at the Revenue side of the King's Bench Division, and was brought for the recovery of the sum of £150, increment value duty assessed under the Finance Act, 1910, in respect of the premises No. 39 St. Stephen's Green, in the city of Dublin. These premises were formerly held by the defendant under a lease, dated the 9th April, 1908, for a term of 800 years from the 1st July, 1907, at the yearly rent of £81 5s. 6d. By an indenture dated the 29th July, 1911, the defendant, in consideration of the sum of £3750, assigned his interest in the premises under the lease to the Bank of Ireland.

The Commissioners of Inland Revenue caused a provisional valuation of the premises under the Finance Act, 1910, to be made on the 1st July, 1913, which valuation was amended on the 11th February, 1914. Copies of these valuations were served on the defendant on the 19th July, 1913, and 11th February, 1914, respectively; and no notice of any objection to the valuation

having been given by the defendant, increment value duty at the sum claimed in the action, namely, £350, was assessed.

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T. H. Maxwell, for the appellant :—

Judgment should have been entered for the defendant. The Finance Act, 1910, is a taxing statute, and must be construed strictly: see judgment of Lord Cairns in *Partington v. The Attorney-General* (1). This case is within neither the letter nor the spirit of the law. The letter of the law has not been observed. By sect. 27, sub-s. 1, of the Act the Commissioners are required to cause a copy of their provisional valuation to be served on the "owner of the land," the owner being defined in sect. 41, in the case of land let on lease for a term of which more than fifty years are unexpired, as "the lessee under the lease." Here the notices of the provisional valuations were served on the defendant, but no evidence was given of service on the Bank of Ireland, who were the owners of the lease. There was, therefore, no proper service of the notices under sect. 27. I further submit that if there be no provisional valuation of the land in existence at the time of the occasion in respect of which increment value duty is claimed, the claim fails, and the party escapes taxation. Here the transfer to the bank was long prior to the making of the provisional valuation. [He referred to *Allen v. Commissioners of Inland Revenue* (2).]

The Solicitor-General (James O'Connor K.C.), for the respondent :—

Increment value duty is properly chargeable in respect of this transfer on sale under sect. 1 of the statute. The sale was one in pursuance of a contract made after the commencement of the Act, and it is immaterial that no provisional valuation was in existence at the date of the sale. The valuation of "all land in the United Kingdom," which by sect. 26, sub-s. 1, of the Act the Commissioners are required to make, is an operation obviously requiring time; and it cannot have been the intention of the Legislature that the liability to increment value duty should depend on the accidental circumstance of the land having been valued, or not having been valued, at the date of the occasion in question.

(1) L. R. 4 H. L. 100, at
p. 122.

(2) [1914] 1 K. B. 327; [1914]
2 K. B. 327.

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Further, the valuation to be made under sect. 26 is one estimated as of the 30th day of April, 1909, a day prior to any possible "occasion" in respect of which the duty could be claimed. No doubt, the copy of the provisional valuation is to be served on the owner of the land under sect. 27, but here both the defendant and the Bank of Ireland were, in fact, served. When no objection is taken to the provisional valuation and no notice of appeal given, the valuation becomes an adjudication in rem, and cannot be challenged subsequently.

Maxwell, in reply.

SIR IGNATIUS J. O'BRIEN C.:—

We do not consider it necessary to reserve our judgment in this case, having regard to the exhaustive examination of the sections in question by Mr. Maxwell, and the assistance given to the Court by the Solicitor-General.

I am of opinion that the judgment of the Court below is right, and that, although it may appear harsh from one point of view, Mr. Adams is liable to pay to the Crown the duty which has been assessed in respect of increment value on the occasion of the transfer to the Bank of Ireland of his interest in the premises.

The first matter which one has to ascertain from the statute is as of what date the site value is to be fixed. As to this, there can be no doubt whatsoever; it is to be ascertained as of the 30th April, 1909, a day prior to that fixed for the actual coming into operation of the statute, namely, the 30th April, 1910. The object for which site value is to be ascertained as of that date appears clearly when we consider sect. 1 of the Finance Act, 1910. [His Lordship read the section, and continued.] It is clear, then, that in respect of all land capable of having a site value, which presumably may be all the land in the kingdom—at any rate in respect of all land so capable—that site value is to be ascertained as of the 30th April, 1909, and if, after the date of the passing of the Act, a transfer on sale of such land takes place in pursuance of a contract made after the commencement of the Act, increment value duty is in accordance with the provisions of

the Act to be payable by the transferor in respect of that transaction. For this purpose it is necessary to ascertain the original site value of the land as of the 30th April, 1909, and in the case of a transfer after the passing of the Act, if the site value of the land exceeds the original site value as ascertained there is made payable a certain tribute to the State in respect of that increase. As I have said, it is intended to be imposed on all land in the kingdom in respect of which there is a transfer after the date of the passing of the Act, and it is to be calculated on the basis of a valuation which, it is admitted, physically could not have been made over the whole kingdom prior to the date of all sales subsequent to the Act, and which had to be made artificially operative as from an earlier date, namely the 30th April, 1909. It was of course clear to anyone framing the Act, and to Parliament in passing the Bill into law, that it would be practically impossible to fix the site value as of this date, prior to the passing of the Act, or until a very considerable time had elapsed, and indeed it is common knowledge that the provisional valuation has not yet been completed over the whole of the United Kingdom, or even over the whole of Ireland. The Legislature, notwithstanding, with full knowledge of the difficulties that might arise, has distinctly and clearly imposed a tax upon transfers taking place after the passing of the Act, and has made it necessary to have this valuation in some way ascertained as of an artificial date, so as to impose a liability on the transferor.

In the present case we are not entitled to discuss whether the site value which has been assessed as of the 30th April, 1909, was too large or too small, because there was no appeal from it.

Two difficulties have been suggested. Mr. Maxwell argues that the only person who can be served with the copy of the provisional valuation under section 27 is "the owner of the land"; "owner" being artificially defined by sect. 41 as follows:—[His Lordship read the section, and continued.] Mr. Maxwell says that at the date when this provisional valuation in respect of site value was made, the appellant had ceased to be owner of the land, and the Bank of Ireland had become owners; and he points out the hardship which

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might arise from the fact that the owner, the person who is to be served with the provisional valuation, may have no interest whatever in disputing the amount of the provisional valuation arrived at by the commissioners, and is under no obligation to hand over the notice of the provisional valuation served on him to his transferor, who may in many cases be entirely ignorant of what has taken place.

There can be no doubt whatever that under sect. 27 the person to be served is the owner of the land, and no other person. In the course of the argument I suggested a case in which *prima facie* the provisions of the Act might operate more harshly than in the present: a mortgagee—more especially a mortgagee in certain parts of Ireland—may be to all intents and purposes the real owner of and the only person interested in the rents and profits of the mortgaged land. He would not be, under the definition I have quoted, the owner to be served with the provisional valuation, but he may be most vitally interested in the provisional valuation of the site; he might be desirous to sell under his power of sale, and it is obvious that this question of site value is one affecting him most materially. It is clear, however, that there is no obligation to serve him with the provisional valuation.

This would appear to be a hardship, but that cannot enable us to hold that the tax which the statute imposes by section 1 in unmistakable terms is, in fact, not imposed in particular cases which must, in the nature of affairs, sometimes arise.

This suggestion of hardship has been met on the other side by another suggestion, which came indeed originally from the Bench, but is, perhaps, not the less worthy of consideration on that account. The effect of Mr. Maxwell's argument would be this, as he admitted, that, instead of the clear express intention of the statute being carried out, according to which all transfers of land after the commencement of the Act, when there was an increase in the site value, were to be made the subject of this special tax based on a valuation as of the 30th April, 1909, it would become a mere matter of chance or luck whether such transfer became the occasion of taxation or not, and that the incident of taxation should depend upon the extent of the power

of the commissioners to have the provisional valuation brought into existence prior to or at the date of the particular transfer in question. That result, which would unquestionably follow from the contention of the appellant, would be absurd, because it is contrary to the express terms of section 1; and, accordingly, it is, in my judgment, the duty of the Court, no matter how harsh the result may be—if it is harsh—to see whether the Act has not provided the only procedure which is to be adopted, and whether that procedure has been adopted in this case. The owner of the land, as I have already said, is the person who is in receipt of the rents and profits of the land, and in this case at the time of the service of the provisional valuation the owners were the Bank of Ireland. A copy of the provisional valuation was in fact served upon the Bank of Ireland, and sub-s. 1 of sect. 27 of the Act has been literally complied with. Great hardship, as I have pointed out, may be worked in other cases, because a “person interested in the land, not being an owner,” who by sub-s. 5 of section 27 is provided with the same right of giving notice of objection to the valuation and of appealing as the owner, may be entirely ignorant of the valuation having been made or served. That matter, however, is one for the Legislature. I think it does appear to be somewhat of a blot on the statute from the point of view of fairness, but the statute gives to the Crown in unequivocal terms this particular right of taxation; it provides a certain method by which the site value is to be ascertained, and this procedure under sections 26 and 27 has been followed literally in the present case.

To my mind, then, there is an end of the appellant's contention. I agree with the view presented by the Crown that the effect of creating this record of site values, which has been called the Domesday Book for convenience, is to make certain decisions which operate in rem. They fix the site value as of this date in 1909, and that in respect of the land itself; and every person who may be interested in the land is bound by that ascertainment, where the procedure which the statute provides—be it ever so crude and harsh—has been complied with. That I take to be the clear intention and object of the statute. In this particular case it is satisfactory to know that the commissioners did in fact serve the valuation on the present appellant, who was, I think, a person

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v.

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"interested in the land," within the meaning of sub-s. 5 of sect. 27, and who certainly would come within the words "any person aggrieved" in sect. 33, so as to be entitled to appeal against the determination of the commissioners. I am sure that the commissioners in all cases will, so far as their power goes, and until the Legislature provides machinery for this purpose, do their best to give notice of the provisional valuation to every person whom they may know to be interested in any way in resisting the imposition of a valuation which might result in large payments by them to the Crown. These considerations, however, cannot affect the construction of the statute.

In my judgment the decision of the Court below was right, and must be affirmed.

RONAN L.J. :—

I rest my opinion in this case on a very short ground. Mr. Maxwell referred us to the dictum of Lord Cairns in *Partington v. The Attorney-General*(1), as to the necessity, when dealing with taxing statutes, of bringing each case within the actual letter of the Act; now in my opinion this case does come within the letter of the Act, because the provisional valuation was duly served on the owner. As the transaction in question was antecedent to the provisional valuation, the owner had no real interest in the valuation, but it must be remembered that the latter was not a valuation made in respect of any particular transaction, nor in reference to any particular sale or specific death. It was a general valuation, just as general as the general valuation of Ireland. Section 26 provides that "the commissioners shall, as soon as may be after the passing of this Act, cause a valuation to be made of all land in the United Kingdom." The whole valuation is to be made once and for all, and is to be the basis of the future taxation. One does not expect to find provision made for a valuation to be made at any particular moment of time, or with reference to any particular transaction. It was recognized that it would be impossible for the commissioners to find out who might be interested in the land at any particular time: as pointed out by the Lord Chancellor, it might be a

(1) 4 H. L. C. 122.

mortgagee, the person receiving the rents and profits being only the nominal owner. The scheme of the statute is that the commissioners are to find out the person in actual receipt of the rents and profits of the land. He is the person to be served with the provisional valuation, and the commissioners are not concerned with anyone else, so far as relates to service of the provisional valuation. It would be impossible to carry out the scheme of the Act in any other way, and we must give effect to the unquestioned intention of the statute that this duty should be payable on the occasion of every such transfer on sale as the present, made in pursuance of a contract entered into after the commencement of the Act. If Mr. Maxwell's contention were to prevail, the absurd result would follow that a transaction would be taxed or not according to the order in which the commissioners are enabled to take up the different properties throughout the entire country for the purpose of arriving at their valuation. It appears to me in this case that in giving effect to the letter of the law we give effect to the intention of the Legislature, and for the reasons given by the Lord Chancellor, I agree that the appeal should be dismissed with costs.

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MOLONY L.J.:—

The intention of the Finance Act, 1910, was that increment value duty should be paid on the occasion of every transfer on sale made in pursuance of a contract entered into after the commencement of the Act, and that this increment value was to be considered as accruing from the 30th day of April, 1909. It then became necessary that all land should be valued throughout the United Kingdom as of the 30th April, 1909, and this, of course, was a task of stupendous character, which was bound to take a considerable time. It was quite clear that many transactions would have taken place, within the meaning of the Act, before the valuation could be completed, which, under ordinary circumstances, it was the intention of the first section of the Act should be assessed with increment value duty. In this case we have to deal with a transfer on sale in pursuance of a contract made after the commencement of the Act. It was the duty of the transferor, under sect. 4, sub-s. 2, of the Act, to present to

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the Commissioners the instrument of transfer, or particulars thereof, and he did give particulars in pursuance of this section.

In due course, on the 11th February, 1914, the valuation was made, and, in accordance with the statute, as of the 30th day of April, 1909.

Mr. Maxwell has first contended that there must be a provisional valuation in existence at the date of the transfer—in this case the 29th July, 1911—and that, as no such valuation had in fact been made at that date, increment value duty could not be assessed at all as against his client. He admitted that, if the Commissioners had been expeditious, and had succeeded in ascertaining the valuation prior to the transfer, duty would have been payable, but, as they were unable to ascertain it prior to the transfer, so much the worse for them, and the transferor escaped taxation. I think that to give effect to such an argument would be to ignore the provisions of the statute, which clearly creates a liability to pay duty in the case of every transfer on sale in pursuance of a contract made after the commencement of the Act, when there is an increase of value.

Mr. Maxwell's second point is that the provisional valuation is required by sect. 27 to be served on the owner of the land, and that, as Mr. Adams was not the owner, therefore he is to escape this liability. I fully agree with the observations of the Lord Chancellor as to this point. The owner to be served under sect. 27 is the owner at the time of service, and I agree that, as a matter of law, the Commissioners are not bound to find out all the intermediate owners to whom the property may have passed in the intervening time.

The Solicitor-General has argued that the provisional valuation has to be made of all land in the Kingdom as of the 30th April, 1909, that this valuation is the basis of all future taxation, and that once the proper procedure is applied the valuation becomes an adjudication in rem. Here the proper procedure has been adopted. Sects. 26 and 27 have been complied with, because the provisional valuation has been duly made under sect. 26, and notice has been served on the owner of the land under sect. 27, the owners at the time of service being the Bank of Ireland, who were duly served. It appears that the Commissioners, *ex abundanti*

cautela, also served the notice upon Mr. Adams. Although, as has been suggested, there may be hardship in certain cases where only the owner, as defined by the Act, is served, that cannot affect the construction of the statute. I have no doubt, however, that in all cases where, as in the present one, intermediate owners who might be affected by the incidence of the duty are known to the Commissioners, notice will be given to such persons, although in point of law the only person to whom they are bound to give notice is the owner at the time of the service of the valuation.

I agree that the appeal ought to be dismissed.

Solicitor for the appellant: *H. F. Leachman.*

Solicitor for the respondent: *Richard Martin.*

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IN THE MATTER OF JOHN SLATTERY.

Dec. 22.
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*Policy of Insurance—Policy taken out and Premiums paid in the name of
Another—Resulting Trust.*

Jan. 19.

A Policy of insurance was taken out by L. in the name of and on the life of J. L. paid the premiums, and retained possession of the policy, and dealt with it as his own property, J. never making any claim thereto. J. afterwards was adjudicated a bankrupt, and subsequently died.

Held, that the policy moneys were payable to L., and not to J.'s assignees in bankruptcy.

CLAIM IN BANKRUPTCY against proceeds of an insurance policy taken out and held in the bankrupt's name.

The following facts were found by Pim J. in his judgment :—

1. Lawrence Slattery took out a policy of insurance for £600 in the Royal Insurance Company in the name and on the life of his brother John Slattery to mature on John Slattery attaining the age of fifty years or at his previous death. 2. Lawrence Slattery kept the policy himself from the time when it was taken out until it was mortgaged to the National Provincial Bank of England to secure Lawrence Slattery's liabilities. 3. Lawrence Slattery paid the premiums himself each year as they fell due, and John Slattery at no time had possession of the policy and never paid any premiums thereon. 4. John Slattery assigned the policy to the bank by the direction and at the request of Lawrence Slattery, and to secure Lawrence Slattery's debt. 5. The policy was taken out in the name of John Slattery because Lawrence Slattery had no insurable interest in John's life, and for the purpose of avoiding the Gambling Act of 1774. 6. John Slattery at no time had any interest in the policy, nor did he ever make any claim thereto.

The Attorney-General (James O'Connor K.C.) and James Sealy, for the claimant, Lawrence Slattery.

H. Hanna K.C., for the assignees in bankruptcy of John Slattery.

The arguments sufficiently appear from the judgment of Pim J.

PIM J. :—

[His Lordship dealt with the facts as set out in the affidavits, and proceeded.]

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SLATTERY.

Jan. 19.

This is a claim made by Lawrence Slattery against the estate of a deceased man, and in such cases the Court should require corroboration of the claim. This is a rule, not of law, but, as it has been called by Jessell M.R. in *Finch v. Finch* (1), a rule of prudence; and I have to see what corroboration is offered by Lawrence Slattery of the claim he now makes. [His Lordship then discussed the evidence, and decided that there was sufficient corroboration of the claim, and, having found the facts as set out above, he proceeded.] The Attorney-General in his argument referred me to the statement in the 17th volume of Lord Halsbury's Laws of England, paragraph 1126, page 562, wherein it is stated that, when an insurance has been effected by one party on the life of another, the latter has, apart from any contract express or implied, no interest in the policy. I do not think that that statement necessarily refers to circumstances such as the present. In the principal case quoted in the note of cases, namely, *Bruce v. Garden* (2), it appears that what was referred to was the case of a person effecting, in his own name, a policy on the life of another. There does not seem to be any case in which the facts are the same as in this one, but the Attorney-General referred me to the case of *In re a Policy No. 6402 of the Scottish Equitable Life Assurance Society* (3), in which Joyce J. has practically decided the question now raised.

In that case a policy of insurance was taken out by A on his own life for the behoof of B, his wife's sister, and the policy provided that B, her executors, administrators, and assigns, should be entitled to receive the policy moneys on A's death. A survived B, retained the policy, and paid the premiums until his death. It was held that the legal personal representative of B were trustees of the policy moneys for the legal personal representatives of A. Joyce J. brought the case which he was deciding, and also such a case as the present one, under the principle which is stated in Lewin on Trusts, 12th ed., p. 184, as follows :—"Not only real

(1) 23 Ch. D. 267.

(2) 5 Ch. App. 32.

(3) [1902] 1 Ch. 282.

K. B. Div. estate, but personalty also is governed by these principles, as if a
1917. man take a bond or purchase an annuity, stock, or other chattel

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interest, the equitable ownership results to the person from whom the consideration moves." In summing up the learned judge said:—"Now in the present case a policy was taken out by Mr. Sanderson (A) a great many years ago, and the name of Miss Styles (B) appears in the policy as the person to whom the money was to be paid. The policy was never handed to her, and she is now dead, and the premiums were always paid and were paid for many years after her death by Sanderson. That really is a case of a man taking a policy out in the name of another, that other person being a sister of his wife, and, therefore, not standing in any relation to him 'that would meet the presumption,' as Lord Eldon expressed it. It comes really to this—a purchase by one in the name of another, with no other circumstances at all proved"; and he decided that, although the legal personal representatives of Miss Styles (that is, B) would be the persons entitled to receive the money at law, and to give a receipt for it, in equity the money belonged to the legal personal representatives of Mr. Sanderson (that is, A), who took out the policy. What could be more absolutely in point than the reasoning and decision of Joyce J. in the case quoted? I admit that I am not bound by the decision, but, even if I thought it doubtful in law, I should hesitate before I disregarded the opinion of Sir Matthew Joyce. I am, however, satisfied that the learned judge is right, and I can see no real distinction between the case which he decided and the case before me.

I must, therefore, hold that Lawrence Slattery is entitled to the sum which he claims, namely, the sum of £771 paid to the National Provincial Bank of England, and afterwards lodged in Court.

Solicitors for the claimant: *I. Thornton & Son.*

Solicitors for the assignees in bankruptcy of John Slattery: *Lowe, Dobbyn, & M'Coy.*

D. M. S.

THE NATIONAL BANK, LTD., v. CLAFFEY AND OTHERS (1). *K. B. Div.*
Nisi Prius.
 1917.
War—Practice—Courts (Emergency Powers) Act, 1914 (4 & 5 Geo. 5, c. 78)—
Mortgagee's Action of Ejectment. Feb. 12.

The institution of an action of ejectment on the title by a mortgagee is not the realization of a security contemplated by sect. 1, sub-s. 1 (b), of the Courts (Emergency Powers) Act, 1914, but is only a step towards realization, and, consequently, leave need not be obtained before issuing the writ.

TRIAL OF ACTION.

The plaintiffs, as mortgagees, brought an action of ejectment on the title against the defendants as mortgagors.

Farrell, for the defendants, at the close of the plaintiff's case, asked for a direction, on the ground that leave should have been obtained under sect. 1, sub-sect. 1 (b), of the Courts (Emergency Powers) Act, 1914, before issuing the writ. An action of ejectment by a mortgagee against a mortgagor is included in the phrase "realize any security." The action is brought to put the plaintiffs in possession of the rents and profits of the mortgaged premises. On the day before the issue of the writ, the plaintiffs could not enter into possession without leave; this would be realizing a security. The issuing of a writ is a proceeding of the same kind, and the same considerations apply. The Act contemplates an inability to pay, which applies to inability to pay the costs of an action. In any event these proceedings, even if they are not within the letter, are within the spirit of the Act.

E. S. Murphy (with him *Herbert Wilson, K.C.*) for the plaintiffs, in reply:—

This is not a realization of a security, but a step towards it. The amending Act (the Courts (Emergency Powers) (No. 2) Act, 1916) indicates that the earlier Act applies to realization, and not to the institution of proceedings for realization.

(1) Before MADDEN J., sitting without a jury.

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MADDEN J. :—

The institution of an action of ejectment on the title by a mortgagee is not realizing a security within sect. 1, sub-sect. 1 (b), of the Courts (Emergency Powers) Act, 1914, but a step towards realization. Ejectment or sale is the remedy usually adopted by a mortgagee in Ireland. The mode of realizing a mortgage security ordinarily adopted in England is by instituting a suit for foreclosure. Sect. 1, sub-sect. 4, of the Increase of Rent and Mortgage Interest (War Restrictions) Act, 1915 (5 & 6 Geo. 5, c. 97), includes as regards a mortgagee the taking of "any steps for exercising any right of foreclosure or sale, or for otherwise realizing his security, or for recovering the principal money thereby secured."

I am asked to extend the principle of this legislation to the present case, to which it admittedly does not apply. This I cannot do, and I accordingly refuse Mr. Farrell's application for a direction.

Solicitor for the plaintiffs: *W. H. Dunne.*

Solicitor for the defendants: *C. Friery.*

T. C. T.

THE KING (DEPARTMENT OF AGRICULTURE AND TECHNICAL INSTRUCTION FOR IRELAND) *v.* THE JUSTICES OF THE PEACE IN AND FOR THE CITY OF LONDONDERRY. THE KING (JOHN MEENAN) *v.* W. HARDY, A JUSTICE FOR THE CITY OF LONDONDERRY (1).

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Feb. 19, 20,
27.

Justices — Jurisdiction — Petty Sessions — Court improperly constituted — Adjudication on a part-heard Case by a Justice not one of the Justices before whom the Case opened — Exclusive Jurisdiction of the Primary Court — Petty Sessions Act, 1851 (14 & 15 Vict. c. 93), sect. 20.

It is a general rule, governing all judicial procedure, recognized by statute and authority, that the judges before whom a case begins are the Court to complete the hearing and determination; and that whether there be an adjournment of the hearing or not, no judge other than the judges before whom the proceedings began can, without the consent of such latter judges, intervene to hear or adjudicate. The act of a judge so intervening without consent would be a manifest abuse of judicial powers.

This rule is not altered or affected by the provisions as to adjournment contained in sect. 20 of the Petty Sessions (Ireland) Act, 1851 (14 & 15 Vict. c. 93); and where a case is opened at petty sessions, and, after the whole or a substantial part of the evidence has been taken, is adjourned (either generally to the next sessions, or in particular to a specific day, hour, or place), no justice other than those before whom the proceedings opened should, without the consent of such latter justices, intervene to hear or determine the case at the adjourned hearing.

An adjudication by a justice so intervening in an adjourned hearing of a part-heard case without consent of the original Bench can be quashed on certiorari as being made without or in excess of jurisdiction.

Every adjournment of a hearing is a continuation of the hearing, and must be referred to the jurisdiction of the original Bench before which the case began.

MOTIONS on behalf of (a) the Department of Agriculture and Technical Instruction for Ireland for a writ of certiorari to bring up and quash two orders of dismissal made by the justices of the peace for the county of the city of Londonderry, sitting at Londonderry petty sessions on the 26th October, 1916; and (b) on

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behalf of John Meenan for a writ of certiorari to bring up and quash two orders of adjournment made by the above justices at Londonderry petty sessions on the 30th October, 1916.

The facts and conclusions therefrom upon which the judgment of the Divisional Court was founded are sufficiently stated in the judgment of Gibson J. The following short synopsis is sufficient to show the grounds on which the motions were based:—Both motions related to proceedings taken by the Department of Agriculture and Technical Instruction for Ireland against John Meenan, who was charged in two summonses at the suit of the Department for—1, driving sheep affected with scab in Foyle Street, Derry, on the 29th July, 1916, contrary to the Sheep Scab (Ireland) Order of 28th March, 1905; and 2, placing such sheep in a lair on the same date contrary to the above Order. The case was heard before Mr. Hardy, resident magistrate, and two justices, Mr. McCully and Mr. James Anderson, on the 25th September, 1916, when all the evidence was taken. Various adjournments from time to time took place in order to obtain from Meenan's solicitor a document which he refused to give up to the Bench; and on the 23rd October, 1916, the Mayor of Derry and other justices who had not been present at the first hearing intervened, claiming a right to rehear the case, a claim to which the resident magistrate objected. An adjournment to the 26th October, 1916, was ordered by the intervening justices. The three original magistrates arranged to take no part in the hearing on that date; and there being no appearance for the prosecution on the 26th October, 1916, the complaints were dismissed. Mr. Hardy, who had arranged on the 23rd October, 1916, for an adjournment to the 30th October, which adjournment he was not allowed to record in the order book, sat on the 30th October, 1916, and adjourned the two complaints against Meenan as still open and undecided.

The Department obtained a conditional order on the 24th November, 1916, in respect of the two orders of dismissal of the 26th October, 1916, on the following grounds:—1. "That the said two orders of dismissal, dated 26th October, 1916, are bad on their face and invalid." 2. "That each and every of said orders was made against natural justice, the complainants not having

been heard nor any witnesses in their behalf, and said orders being made in complainants' absence and the absence of their solicitor." 3. "That each and every of said orders was made without jurisdiction." 4. "That each and every of said orders was made in excess of jurisdiction." 5. "That each and every of said orders was made without evidence to support it." 6. "That each and every of said orders was made by a differently constituted Bench from that which had originally heard the evidence in each of said cases, and which Bench had adjourned both cases without adjudicating on the merits of either."

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Meenan also obtained a conditional order on the 21st December, 1916, in respect of the two orders of adjournment of the 30th October, 1916, on the following grounds:—"That the said justice (Mr. Hardy) acted without jurisdiction, inasmuch as the said complaints had already been heard and determined upon the 26th October, 1916." Both motions were heard together.

The Attorney-General (James O'Connor K.C.) and Serjeant McSweeney K.C. (with them Cusack), for the Department of Agriculture:—

Once a case, as here, has begun before a Bench of justices and has been part-heard and is then adjourned, no justices except those who took part in the first hearing can hear and determine it. This principle is recognized by the provisions of the Petty Sessions (Ireland) Act, 1851, 14 & 15 Vict. c. 93, and is covered by a number of authorities such as *R. (Sullivan) v. Cork Justices* (1): *R. v. Sainsbury* (2): *R. (Bransfield) v. Cork Justices* (3), per Palles C.B., at p. 160.

Wylie K.C. and E. Murphy, for the Mayor of Derry:—

Neither the Mayor nor any of the justices who acted with him had any desire to delay or obstruct justice: what they did was in bona fide belief of right. Their case rests first upon a claim to jurisdiction inherent in them as justices, and secondly on invitation by the original justices to join in the hearing and determination. The second point depends entirely upon the facts. As to the claim to inherent jurisdiction, there must be inherent

(1) 18 L. R. Ir. 99. (2) 4 T. R. 451. (3) [1912] 2 I. R. 151.

K. B. Div. jurisdiction in the Bench present at any sittings to hear and
 1917. determine a case which has stood over: if there were not, justice
 R. would be delayed. Justices who attended on the day when the
 (DEPT. OF AGRIC.) case first came on might not attend again for a very long time, and
 v. the case would, on the contention of the Department, have to
 JUSTICES OF DERRY. stand over until the original Bench was again assembled. Under
 R. sect. 20 of the Petty Sessions (Ireland) Act, 1851, 14 & 15 Vict.
 (MEENAN) c. 93, provision is made for adjourning undisposed of cases to the
 v. next petty sessions, and unless a special order is made adjourning
 HARDY. a part-heard case to a special Court, the adjournment under that
 section would be to the next Petty Sessions Court, that is the case
 would take its place in the ordinary business before the Bench
 assembled on that day, and a part-heard case thus generally
 adjourned would be taken up as new business. The section
 provides for special orders of adjournment to be made in special
 cases, but deals generally with adjournments as placing undis-
 posed of cases, including part-heard cases, in the list for the next
 petty sessions day.

Babington, for Meenan.

Cusack, in reply :—

No case of invitation can be made out on the facts. If there was any jurisdiction at all in the intervening justices, they manifestly abused their jurisdiction in intervening to rehear a case in which all the evidence had already been taken by a competent Court, and which was adjourned for the purpose of adjudication.

Cur. adv. vult.

Feb. 27.

GIBSON J. delivered the judgment of the Court:—

Two applications for certiorari are before us relating to the same circumstances—one by the department to quash two dismissals, dated October 26th, 1916, as being without jurisdiction, and also on their face invalid; the other by Meenan, the accused, to quash orders of adjournment, dated October 30th, 1916, on the ground that the complaints had been determined on October 26th, 1916. The complaints were against Meenan, a drover, for driving sheep affected with scab in Foyle Street, Derry, and putting such sheep in a lair contrary to the Sheep Scab (Ireland) Order of

28th March, 1905. The Order was made under the Diseases of *K. B. Div.*
 Animals Act, 1894 (57 & 58 Vict. c. 57), the 57th section of which — 17.
 enacts that the person in charge is presumed to have knowledge of *18.*
 the existence of the disease unless and until he shows to the satis- *(DEPT. OF*
 faction of the Court that he had not knowledge thereof, and could *AGRIC.)*
 not with reasonable diligence have acquired such knowledge. *v.*
 The broad question for decision is, whether under the Petty Sessions *JUSTICES OF*
 Act, when a case has been heard by a competent Bench and the *DERRY.*
 witnesses on the merits examined, but the final determination is *R.*
 adjourned to another petty sessions day, the adjournment carries *(MEENAN)*
 with it a right on the part of the magistrates then assembled to *v.*
 rehear the case ab initio. Counsel for the Department contend *HARDY.*
 that such procedure would be an unheard of departure from the *Gibson J.*
 invariable rules governing all judicial tribunals; that it would
 be a fatal blow to the administration of justice, which should be
 kept free from any possibility of suspicion or influence; and that
 it would impose on litigants a wholly unreasonable burden of
 expense, as well as uncertainty and delay. Counsel for the mayor
 and the justices acting with him urge that such procedure is
 sanctioned by the Petty Sessions Act, and is in accordance with
 previous practice in Derry. There was also a point of minor
 importance, whether the primary Court assented to the new
 magistrates dealing with the complaint, which would be a pure
 question of fact, and whether such assent would be irrevocable.
 The form of the order, "dismissed," without saying whether on
 the merits or without prejudice (as to which see Mr. O'Connor's
 work at pp. 156, 175), was adverted to; but the Court did not
 require it to be discussed, and it is not now decided.

The painful controversy in public court, with dispute culmi-
 nating, on October 23rd, in physical force, could have been avoided
 if, after the Crown Solicitor and Mr. Hardy had declined to allow
 the mayor to participate in the adjudication, he had yielded for
 the moment. The legality of his exclusion could have been
 tested on certiorari: *R. v. Williamson* (1); *R. (Bransfield) v. Cork*
Justices (2); or by prohibition.

I give a short synopsis of the facts and my conclusions from
 the contradictory evidence which I do not discuss in detail. The

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memory of the witnesses may be at fault or unconsciously tinged with natural bias in their own favour by the heated surroundings. The newspaper reports, said to be accurate, supply a contemporaneous record which is not without value. Probability is also useful in dealing with conflicting statements.

The scab-affected sheep were owned by Moore, who was the person really blamable; but, as he resided in Fermanagh, proceedings against him in Derry failed. The sheep were consigned by rail to Derry, and were taken, on July 29th, from the railway-station by Meenan, a drover, who received from the company a form of declaration in their custody purporting to show that the sheep had been dipped on July 8th previously.

The complaints against Meenan were fully heard before Mr. McCully, Mr. Hardy, and Mr. James Anderson on September 25th, when all the witnesses (including a veterinary surgeon) for the prosecution were examined, and Meenan gave evidence on his own behalf. He produced the declaration, which the resident magistrate, when he saw it, regarded as suspicious and possibly not genuine, and therefore requiring further investigation. Mr. Babington, solicitor for Meenan, having got back the paper, refused to give it up to the Court. The various adjournments arose out of this refusal by Mr. Babington, who had acted for Moore in the abortive proceedings, a circumstance which probably affected Mr. Hardy. Mr. Hardy did not commit the solicitor for contempt, and the various adjournments were futile as a means of getting back the declaration. I think the magistrates overlooked the fact that the drover getting the declaration from the railway company could not be expected to inquire into its genuineness. If it was forged, the blame would rest with Moore, and should not have prejudiced Meenan's defence, or influenced the punishment for the offence. Further, if the sheep were visibly affected with scab when in Meenan's charge on July 29th, the dipping on July 8th would have been irrelevant. The declaration was probably intended to be relied on as showing that the drover was led to believe that the sheep were all right and that his attention was not directed to their condition. Mr. Hardy states that the Bench decided to convict irrespective of the result of the investigation of the genuineness of the paper. Whatever his own view may have

been, I am not satisfied that any final conclusion was arrived at by the Bench as a whole (1), though, as I have already observed, the genuineness or forgery of the declaration was a matter with which Meenan had no concern. There was no evidence whatever of guilty knowledge on his part. In my opinion, there was an error in judgment in adjourning for any such object as Mr. Hardy states. The first adjournment was to October 2nd, when, Mr. Babington still declining to give up the paper, there was a further adjournment to October 16th. Mr. Babington was not then able to be present, but was represented by Mr. Robinson (who has not made an affidavit), and it was arranged that pro forma—to meet a technical difficulty—adjourning over a petty sessions day—there should be a formal adjournment to the 19th, but that the effective adjournment was to be to October 20th. This arrangement was apparently not communicated by Mr. Robinson to Mr. Babington, though Mr. Hardy states it was reported in the newspaper of October 17th.

Mr. Babington attended with counsel, who appeared in the case for the first time, on the 19th October, the day when the mayor first came in. It is obvious that Mr. Babington on this occasion had made up his mind to get a re-trial of the case. The new development took the prosecution by surprise. Dr. Todd was not at first present. Mr. Hardy was confronted with a difficult situation where he would wish, without abandoning his own legal position, to avoid any semblance of discourtesy or disrespect to the chief magistrate of the city, to whom he tried to explain the position before entering Court. Having carefully studied the evidence and the contemporaneous newspaper report, I think that nothing that occurred on the 19th could be construed as an acceptance by the original Bench of the mayor and his colleagues as a tribunal to rehear the prosecution. It was certainly not so understood at the time. The cases were adjourned to the 20th, when Dr. Todd, with whose view the resident magistrates concurred, renewed the objection to the new magistrates participating. Six new justices, including the mayor, were present, but three prudently retired. Defendant's counsel urged that the complaints should be dismissed; the justices being equally divided, "no rule"

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K. B. Div. 1917. was entered in the order book, and an adjournment to the 23rd was entered. All previous adjournments had been recorded as "for the Court"; on this occasion and on the 23rd October the form was altered to "the next petty sessions."

R. (DEPT. OF AGRIC.) v. JUSTICES OF DERRY. On the 23rd Dr. Todd was unable to be present owing to official business elsewhere, and an adjournment to October 30th was applied for. The objection as to the incompetence of the new justices was again pressed, and Mr. Hardy was writing an order for adjournment to October 30th in the order book, when the Mayor forcibly wrested the book from him, and deleted what he had written. "No rule," as before, was entered as to dismissal, and an adjournment to the 26th recorded. Mr. James Anderson apparently did not object to the intervention of the Mayor; but his assent could not bind his colleagues. His position towards the Mayor was delicate and difficult. He did not object to the adjournment stated by Mr. Hardy, which was written out and forwarded to Dublin, and on the following day, October 24th, the three original magistrates met, and agreed to take no part in the proceedings of the 26th, on which day, there being no appearance for the complainants, the charges were dismissed. Mr. Hardy sat on the 30th, and further adjourned the cases as still being open. This order is challenged by Meenan as being void owing to the dismisses on the 26th. If Mr. Hardy's adjournment to the 30th was valid, the hearing on the 26th was clearly without jurisdiction.

In my opinion, the original Bench never surrendered the performance of the duty which they were to perform to the Mayor and his fellow-justices. The various adjournments of the proceedings were part of the hearing. They must be referred to the jurisdiction of the primary Court. An adjournment is an extension of the hearing by the same Court. It is a judicial act: *R. (Mulcahy) v. Tipperary Justices* (1), a case of equal division, where a new hearing might be necessary. Whether the adjournment be for days or weeks or from day to day, while the case has not been determined, the duty of the Court engaged in the case is the same: to hear and determine.

(1) [1903] 2 I. R. 108.

At no period during this unhappy dispute did the Mayor rely on any assent to his action by Mr. Hardy. His claim was put as a matter of right. He knew he was adjudicating against the protest of the Crown Solicitor and resident magistrate, with whom Mr. M'Cully, who has made no affidavit, is said to have concurred.

I now take up the Petty Sessions Act (14 & 15 Vict. c. 93), sect. 20, which, according to Mr. Wylie, brings all cases not actually determined on any Court day into the next petty sessions to be disposed of as new business, unless a special order otherwise is made. There is no authority precisely in point; such an amazing situation as that before us probably never occurred before. I do not, therefore, consider the decisions in detail, such as *R. v. Sainsbury* (1), followed in *Lawson v. Reynolds* (2), deciding that jurisdiction duly exercised by justices in appointing a licensing meeting was thereby exhausted, and could not be further exercised by other justices possessing concurrent jurisdiction; *Jones v. Gurdon* (3), where jurisdiction was confined to a particular justice; *R. (Bransfield) v. Cork Justices* (4), where the same principle was applied; *R. (Sullivan) v. Cork Justices* (5), determining that where a case is fully heard and only adjourned for the purpose of determining, the same justices must adjudicate.

The value of the cases, particularly the language of Lord Kenyon in *R. v. Sainsbury* (1), adopted in *R. (Bransfield) v. Cork Justices* (4), is that they assume the rule of judicial conduct. In Nun and Walsh, ed. 1841, p. 80, the mischief of collision of jurisdiction as inevitably tending to destroy all respect for authority is emphasized. Mr. Justice Hayes, in his Criminal Law, vol. ii, p. 462, dealing with justices, says:—"Before taking cognisance of a matter the justice should be careful to ascertain whether the case has already come within the cognisance of another magistrate; for, if so, he ought to refrain."

Speaking generally, I think it is settled law that where a Court has entered on a case it is bound to dispose of it; whether there is an adjournment or not, other judges cannot, without their

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(1) 4 T. R. 451.

(2) [1904] 1 Ch. 718.

(3) 2 Q. B. 600.

(4) [1912] 2 I. R. 151.

(5) 18 L. R. Ir. 69.

K. B. Dw. consent, take it out of their hands. This is obviously so in the 1917. Superior Courts. Such forcible intrusion would be inconceivable, and though the judgment of the intruding judges might, in a sense, be within jurisdiction, it would be a manifest abuse of judicial powers. So in an indictable case to be returned for trial (often heard at Petty Sessions, as Mr. O'Connor states in his work: see Petty Sessions Act, sects. 14, 15), a magistrate engaged in taking depositions cannot be ousted or superseded by other justices who come into Court: *R. (Rea) v. Davison* (1); *R. v. Guerin* (2).

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Taking the recognized general rule of judicial procedure to be what I have stated, if it had been intended to create an exception to the rule in Ireland at petty sessions, where the necessity of applying it would be peculiarly important, this surprising innovation should have been expressed in explicit language, leaving no uncertainty as to intention. A summary jurisdiction court is a court of record, and has an inherent power of adjournment apart from statute: *R. (Sullivan) v. Cork Justices* (3); and an adjournment under such implied power would manifestly preserve the identity and duty of the Court intact and continuous. That the statutory adjournment should have a different effect, and cancel, as it were, the entire of the first-day hearing and evidence, would seem unintelligible.

Section 20, enabling the justices then present to adjourn to the next court day or some other day, not necessarily a court day (and it is to be noted that, as to jurisdiction, there is no distinction between the two days whichever is selected), must be explained by the necessities of ordinary procedure. Some cases may go on for days or even weeks. Petty sessions court days may be appointed daily, weekly, monthly, or otherwise. Where the next petty sessions day is remote or the business at such day may be considerable, the convenient course in dealing with unfinished cases might be to adjourn to a special day, hour, or place. In many instances an adjournment to the next petty sessions day might better suit the justices, who, after disposing of the part-heard case, could take up the other cases in the list. Where, however, new justices attended on the adjournment day, the order of business could be

(1) [1913] 21 R. 342, at pp. 361, 362. (2) 16 Cox 596. (3) 18 L. R. Ir. 99.

arranged in such a way that such justices could be let away as soon as possible. If the mere fact of adjournment put every case heard, but not determined, into the adjourned list to be dealt with as a new case, it would manifestly tend to produce distrust and suspicion. The new justices might take quite a different view from their predecessors, and the original justices might feel under no duty to attend again. The expense of witnesses would have to be incurred a second time, which, in the case of witnesses coming from a distance, or witnesses of a professional class, would be a serious matter. Where an accused person was kept in custody, his detention should not be prolonged by the case being heard *de novo*. Normally, cases would be heard and determined on the first day. The special power of adjourning a part-heard case to a special place as well as a special time had to be provided for, as such adjournment would otherwise have been incompetent, the earlier provision relating only to the court-house and a day proper. This special power would be of little practical value where petty sessions were held daily or very frequently. The clause as to witnesses does not impose on witnesses the obligation of attending every adjournment. When examined, the witnesses would be let go, as they are in jury trials when a case is of long duration. An adjournment might be for months ahead (as in *R. (Sullivan) v. Cork Justices*) (1); and it would be preposterous that they should be kept in attendance on the chance that a new Court might be constituted.

Test the question before us by the following illustrations:—
 1, a case is heard on a petty sessions day, and before it is concluded other justices come in: could it be supposed that they could claim to adjudicate? 2, a Court has heard a case and come to a conclusion, but adjourns the recording of the determination to settle the form of order or as to costs, a situation discussed in the case of *R. (Sullivan) v. Cork Justices* (1); 3, a Court has partly heard a case, but on account of its difficulty has adjourned the decision; 4, a Court has heard a substantial part of, but not all, the evidence. In all these three latter types of cases, from the 2nd to the 4th, Mr. Wylie is obliged logically to contend that the justices at the adjourned sessions would, as a matter of jurisdiction, be entitled

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K. B. Dw. to insist that they would re-try the adjourned complaint in the
 1917. petty sessions book, as it would remain undetermined till the
 R. decision was recorded, up to which time the Court might change
 (DEPT. OF AGRIC.) its mind. Pressed to its extreme result, Mr. Wylie's contention
 v. would seem to involve that sect. 20 treated all part-heard cases as
 JUSTICES OF in the same position as unheard cases, and as requiring such cases
 DERRY. to be tried as new business.

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 (MEENAN) He suggested that if his interpretation was not adopted, the
 v. proceeding might become abortive from justices failing to attend
 HARDY. to resume the hearing. It is, however, the clear obligation of a
 Gibson J. Court to the public and litigants to finish the duty it has under-
 taken to discharge, unless prevented by some adequate cause, or
 unless they honestly require a re-hearing. The parties are entitled
 to their decision. Circumstances may no doubt arise where new
 justices may be justified in taking up an unfinished case, as where
 the original Bench wishes to retire, or is unable from fatality to
 sit, or the parties so consent. It is undesirable to attempt to
 define the conditions which would make such exercise of jurisdic-
 tion proper. In many cases, especially where only an unimportant
 witness has been examined, even on the first day without any
 adjournment at all, a Court might, without impropriety, invoke
 the assistance of other justices who happened to come in, and
 might begin afresh. I suspect the Derry precedents, referred to in
 general terms in the affidavits, were of this class, but I doubt
 whether in Derry or elsewhere newcomers, against the wish of the
 original Court, have ever attempted to force themselves into an
 adjudication.

I have looked into other enactments and provisions which
 indicate that summary jurisdiction law is subject to the ordinary
 judicial principle. Section 20, sub-s. 4, of the Petty Sessions
 (Ireland) Act, 14 & 15 Vict. c. 93, requires on request a note of
 the evidence in writing to be kept in a book to be signed by one
 of the justices hearing the complaint on the day when the same
 has been determined. This is taken from 6 & 7 Will. 4, c. 34,
 s. 2, and contemplates one note taken at a continuous hearing.
 The Criminal Justice Act, 1855, 18 & 19 Vict. c. 126, enables
 simple larcenies, though indictable, to be tried on consent
 summarily, and prescribes the procedure in sects. 2, 3, and 9. It

is clear that the original Bench should adjudicate, the law being assumed to be as I have stated. The Act of 1914 (4 & 5 Geo. 5, c. 58), s. 10, sub-s. 2, commands the Court to adjourn before deciding, which also must refer to the primary Court as deciding upon such adjournment. Jervis's Act, 11 & 12 Vict. c. 43, regulating summary procedure in England, passed shortly before our Petty Sessions Act, proceeds on the same view of law. The drafting is somewhat different, but it could have hardly been intended that there should be a radical difference in fundamental principle between the two countries.

I have endeavoured as far as possible in dealing with this distressing controversy to abstain from saying anything which might deepen or prolong the irritation evoked at sessions, which, now that the mistake has been corrected and the law declared, it is to be hoped will disappear and be replaced by the former cordial relations so necessary to loyal co-operation in the performance of judicial duty and the authority of the local bench. With that view I have stated briefly my conclusions on the effect of the evidence without detailed examination of the various contradictions in the affidavits, some of which impute motives without necessity or justification. I acquit the witnesses of any desire wilfully to mislead or misrepresent, though they may be inaccurate, as might be natural in the atmosphere of heated controversy through so many days. The mayor and his colleagues were probably influenced in their action by the delay that had taken place in dealing with the comparatively innocent Meenan, when the chief wrong-doer, Moore, was let go free; and they were pressed by counsel, who, not having been at the earlier stages, urged that the case should be heard by the new bench. Still the course taken, though the result of mistake, was deliberate; it was calculated to impair the dignity and authority of the Court, and if allowed to pass unchallenged, would have established a disastrous precedent fraught with mischief throughout Ireland. When without evidence the justices assumed to dismiss prosecutions under an important and valuable statute, by a form of order which was of doubtful validity, and which might have the effect of making renewal of the prosecutions impossible, they incurred a grave responsibility. Their action was in violation of

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K. B. Div. the rules of judicial conduct : *R. (Martin) v. Mahony* (1), which the
 1917. Petty Sessions Act did not alter. They usurped jurisdiction, taking
 cases which belonged to another Court and dealing with them on
 a day to which they were not lawfully adjourned.

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The conditional order to quash the orders of October 26th will therefore be made absolute, and the conditional order to quash the order of October 30th, based on the supposed validity of the order of October 26th will consequently be discharged. The justices showing cause in the first case and Meenan in the second case will pay the respective costs incident to the applications and argument.

Solicitor for the Department of Agriculture : *Henry Arthur Wynne, Chief Crown Solicitor.*

Solicitor for the justices : *C. Douglas Scott.*

Solicitors for Meenan : *Messrs. Miller & Babington.*

C. N. K.

(1) [1910] 2 I. R., at p. 742.

REX (DOBBYN) v. THE JUSTICES OF THE CITY
OF BELFAST (1).

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Justices—Jurisdiction—Court illegally constituted—Exclusion at Adjourned Hearing of a Justice not a Member of the Bench before which the Case began.

The rule laid down and applied in *R. (Department of Agriculture) v. Derry Justices*, ante, p. 283, namely, that where a case has been opened at petty sessions and is adjourned after the whole or a substantial part of the evidence has been taken, exclusive cognizance to hear and determine is vested in the justices before whom the proceedings were opened, is not affected where, to convenience a party, the evidence taken at the earlier stages is repeated at the adjourned hearing. Such repetition, made for such purpose, does not make the adjourned hearing a hearing de novo so as to allow a justice, not a member of the Bench before whom the proceedings began, without the consent of such Bench, to hear and determine, and the exclusion of such justice from adjudication is not wrongful.

The mere presence on the Bench, at an adjourned hearing of a part-heard case, of a justice not a member of the Bench having exclusive jurisdiction, not objected to till a late stage of the hearing, is not sufficient proof of assent by the justices having exclusive cognizance to the participation of such justice in the hearing. Positive proof is required of such assent.

MOTION on notice for an absolute order for writ of certiorari to bring up and quash an order of conviction made by Mr. Gray, resident magistrate, against the prosecutor on the 12th of March, 1917, at Belfast petty sessions, and for an absolute order for a writ of habeas corpus ad subjiciendum directed to the governor of His Majesty's prison, Belfast, to bring up the body of the prosecutor.

The prosecutor, James J. Dobbyn, a schoolmaster in Belfast, was arrested under the Defence of the Realm (Consolidated) Regulations, 1914, on four charges, and brought before the Petty Sessions Court at Belfast on the 26th of February, 1917. The charges, which were under clauses 27 b and 42 of the Regulations,

(1) Before GIBSON, KENNY, and GORDON JJ.

K. B. Div. were as follows:—1, that the prosecutor, on the 7th of September, 1917, 1916, at Belfast, did make statements in writing addressed to one Cahal Shannon, Detention Barracks, Reading, likely to cause disaffection to His Majesty; 2, that the prosecutor, on the 17th of October, 1916, at Belfast, did make statements in writing to one James Smith, Frongoch Camp, North Wales, likely to cause disaffection to His Majesty; 3, that the prosecutor, on the 7th of September, 1916, at Belfast, did make statements likely to cause disaffection to His Majesty; 4, that the prosecutor, on the 17th of October, 1916, at Belfast, did make statements intended or likely to cause disaffection to His Majesty. The justices present and sitting on the 26th of February, 1917, at Belfast petty sessions, were Mr. Gray, resident magistrate, and a Mr. Macken, J.P. Evidence material to show guilty intent on the part of the prosecutor was given by a Constable Concannon, and after that evidence had been taken down in writing, and signed by the constable, and the orders of the competent military authority, under clause 56 of the Defence of the Realm (Consolidated) Regulations, 1914, directing the charges to be prosecuted before a court of summary jurisdiction had been put in, the case was adjourned to the 5th of March, 1917, for the purpose of obtaining expert evidence of the handwriting of the letters upon which the charges were based, and also evidence of the meaning of some Irish words which occurred in those letters. The prosecutor was remanded on bail. The prosecutor was represented by his solicitor, Mr. B. Campbell, and the Crown by Mr. Moorhead, crown solicitor. Prior to the 5th of March, 1917, it was agreed between Mr. Moorhead and Mr. Campbell that the case should be further adjourned, Mr. Campbell undertaking to admit the handwriting of the letters. On the 5th of March, 1917, the justices present were Mr. Gray and a Mr. Hynes.

Constable J. P. Folan, called by the Crown, proved that the Irish words in the letters were innocent in meaning. His evidence was taken down in writing, and signed by him. Mr. Campbell admitted the handwriting of the letters, and the case was then adjourned to the 10th March, 1917, to enable the defence to be prepared, the prosecutor being again remanded on bail. The order book stated the names of Mr. Gray and Mr. Hynes in the

column of justices present, and the order as signed by Mr. Gray. *K. B. Div.*
 On the 10th March, 1917, a Saturday, Mr. Gray again sat, 1917.
 and with him there were on the bench a Mr. Young, J.P., and a ²
 Mr. McAuley, J.P. By agreement the case was adjourned to the (DOBBYN)
 12th March, 1917, in order to enable counsel for the defence to be v.
 present. The order book stated the justices present as being JUSTICES OF
 Mr. Gray, Mr. Young, and Mr. McAuley, and set out the order as BELFAST.
 signed by Mr. Gray. On Monday, the 12th March, 1917, Mr. Gray
 sat in the Belfast Custody Court with Mr. McAuley, and after some
 ordinary business had been disposed of, the prosecution against
 Dobbyn was taken up. Mr. Moorhead (apparently to assist
 counsel for the defence, who appeared for the first time) gave a
 short history of the case, and had Concannon recalled and resworn.
 Concannon's evidence was read out until a certain portion was
 reached, when Mr. T. J. Campbell, counsel for Dobbyn, objected
 to the passages about to be read, which were very damaging to his
 case, on the ground that they were not admissible as evidence.
 Mr. Gray ruled in Mr. Campbell's favour without consulting
 Mr. McAuley, or without any intervention by that justice.
 Concannon was cross-examined by counsel; but Folan was not
 recalled, his evidence being merely read. Counsel addressed the
 Bench, at the close of the case for the defence, as "worships"; and
 Mr. Gray, on hearing the plural, stated that he alone had
 cognizance of the case, and, turning to Mr. McAuley, asked him
 did he intend to adjudicate. Mr. McAuley stated he did, where-
 upon Mr. Gray said that Mr. McAuley could not take part in the
 case, as the justices before whom it had begun alone had
 cognizance of it; that, as Mr. Macken was not present, he
 (Mr. Gray) alone could deal with the case. Counsel for the
 prosecutor submitted that, as the Court had all the evidence
 before it, the hearing was a hearing de novo—a contention which
 Mr. Gray refused to accept. Counsel then argued that Mr. Gray
 could not proceed in Mr. Macken's absence, but upon Mr. Gray
 offering to adjourn the hearing to enable that point to be argued,
 it was found that no day could be fixed to suit all the parties, and
 thereupon Mr. Gray stated his intention of proceeding with the
 case alone. Mr. McAuley took no part in the proceedings.
 Counsel addressed the Court, and Mr. Gray convicted the

K. B. Div. prosecutor, and sentenced him to three months' hard labour
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 without prejudice.

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Mr. McAuley made an affidavit, wherein he swore that he was on the rota of justices sitting in Belfast Petty Sessions on Saturdays and Mondays, and wherein the following passage occurred:—"I say that I lost several hours listening to the evidence in the case, and was not informed at the opening of the case that I could not adjudicate, for if I had been so informed I would have left at the time." It appeared that Mr. McAuley was in error in stating he was on the rota for Saturdays and Mondays, as he was only on the rota for Mondays. It did not appear from any of the affidavits that Mr. McAuley, apart from his presence on the Bench, had taken any part in the hearing, or spoken at all, until questioned by Mr. Gray. Mr. Gray in his affidavit stated that objections taken in the course of the hearing were ruled on by himself alone, without any conference with or intervention by Mr. McAuley, and also that, on being informed that he could not adjudicate, Mr. McAuley pushed back his chair to indicate his retirement. The entry in the order book of the 12th March, 1917, against the prosecution gave the name of Mr. Gray only as the justice present, and the conviction was signed by him.

The grounds upon which it was sought to quash the order of conviction were as follows:—"That the Court making same was illegally constituted, and that the said order was made without and in excess of jurisdiction."

T. J. Campbell, for the prosecutor:—

The point raised at sessions, namely, that Mr. Gray could not adjudicate without Mr. Macken, is ruled against the prosecutor by the decision in *R. (Sheehy) v. Kerry Justices* (1).

The hearing on the 12th March, 1917, was essentially a hearing *de novo*. In the first place, there had been two previous adjournments; the case had been three times before the sessions prior to the 12th March; and it appears from the order book that on each of these three occasions all the justices present adjudicated. All the proceedings prior to the 12th March, 1917, were really formal

The evidence of Folan as to the Irish words proved to be immaterial, and Concannon was recalled on the 12th. His evidence was repeated, and he was cross-examined. If there was any irregularity in either reswearing Concannon or not recalling Folan, that could be waived by the defence: *R. v. Jeffreys* (1). The material evidence for the prosecution was the contents of the letters which the defence admitted to be in the prosecutor's handwriting. The case for the prosecution from start to finish was reheard on the 12th, and Mr. Moorhead recapitulated what had been done in his address to the Bench.

Even if Mr. Gray had exclusive cognizance, his conduct shows that he acquiesced in Mr. M'Auley participating in the hearing. No statement was made by Mr. Gray as to his exclusive cognizance of the case until the late stage of the case, when the defence was closing. The hearing, which began with the initial stages of the prosecution, took about five hours. During the repetition of the crown case, the cross-examination of the crown witness, and the examination of the witnesses for the defence, Mr. Gray had not stated that he alone was trying the case. During the whole hearing Mr. M'Auley sat on the Bench, and the impression conveyed by the whole course of the hearing up to the time when Mr. Gray stated that he alone could deal with the prosecution, was that it was a complete hearing by both the justices present. If Mr. Gray assented to Mr. M'Auley trying the case, he could not afterwards withdraw his assent and refuse to allow his colleagues to adjudicate: *R. v. Thomas* (2).

Carrigan K.C. and Devitt, for the justices:—

Mr. Campbell's first proposition is ruled by the recent case of *R. (Department of Agriculture) v. Derry Justices* (3). On the 26th February, 1917, most material and substantial evidence was given. Concannon's evidence was so material that Mr. Campbell was forced to object to certain portions of it, and succeeded in that objection. The materiality of Folan's evidence must be judged by its necessity; it could not have been omitted. On the admission of the letters and the entry of the orders of the military authority the crown case had closed. The adjournments subsequent to that

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(1) 22 L. T. R. 786. (2) [1914] 1 K. B. 32. (3) Ante, p. 283.

K. B. Div. to the 5th March were made to facilitate the defence, and it was
1917. to assist the counsel for the defence that the evidence for the

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prosecution was repeated on the 12th March, 1917.

There is nothing to show that Mr. Gray assented to Mr. M'Auley intervening. There is no positive proof as to such assent; on the contrary, the positive proof is that when the question as to jurisdiction was raised Mr. Gray openly stated that he alone had cognizance of the case.

Even if Mr. Gray had not exclusive cognizance, he could have dealt with the case by himself had there been no other justice there; and when he stated his intention of hearing and determining the case alone, Mr. M'Auley made no protest, and took no steps to assert his right to adjudicate. Mr. M'Auley's conduct clearly amounted to an assent to Mr. Gray dealing with the case alone. Mr. M'Auley himself states that had he been informed at the beginning that he could not adjudicate, he would have left the Court.

GIBSON J.:—

This is an application on behalf of James J. Dobbyn to make absolute a conditional order, first, for a writ of certiorari to quash a conviction made by Mr. James Gray, R.M., at Belfast Petty Sessions on the 12th March, 1917, and, secondly, for a writ of habeas corpus ad subjiciendum.

The case has been very ably and fully argued, and can be disposed of without reserving judgment. We are greatly indebted to Mr. Campbell, counsel for the prosecutor, for the candid and full manner in which he has presented his case. There appears to be no substantial controversy as to the facts such as took place in the recent case from Derry.

The prosecution was under the Defence of the Realm (Consolidation) Regulations, 1914, clause 56 (1), under which Dobbyn was arrested and brought before the Petty Sessions Court at Belfast on the 26th February, 1917. The justices present were Mr. Gray, R.M., and Mr. Macken, J.P. Evidence was given and the order of the competent military authority directing prosecution before a Court of summary jurisdiction under clause 56 (3) of the above regulations necessary to found jurisdiction was

entered. We do not, of course, decide that this order per se conferred upon the two justices then present exclusive cognizance of the case. At this first hearing, in addition to the proof of the order, very material evidence, appropriate to show guilty intention on the part of the accused, was given by Constable Concannon. This evidence was taken down in a deposition, and the hearing was then adjourned to the 5th March, 1917, the accused being remanded on bail. This adjournment was made principally to enable evidence as to the handwriting of defendant's letters, upon which the prosecution was based, to be obtained. On the 5th March, 1917, Mr. Gray and a Mr. Hynes were present on the Bench, but Mr. Macken was absent. Further evidence was given by Constable Folan and taken down in a deposition. He translated some Irish words which appeared in the above letters. It appeared from his translation that these words were apparently innocent, but they might have been otherwise or they might have been code words, and the possible materiality of this evidence at that stage cannot be tested by its final result. It was a necessary part of the proof. The handwriting of the letters was admitted on behalf of the accused, and it was arranged that there should be an adjournment to the 10th March, 1917, to enable the defence to be prepared. On the 10th March, 1917, a Saturday, Mr. Gray, Mr. Young, and Mr. M'Auley, the latter being the justice whose exclusion on the 12th March, 1917, is here in question, were present in Court, and the hearing of the prosecution was adjourned by Mr. Gray, by consent, to the following Monday, the 12th March, in order to enable counsel for the accused to attend. On the 12th March, 1917, Mr. Gray and Mr. M'Auley were again present. After the ordinary business had been disposed of, the prosecution against Dobbyn was taken up at about 11.45 in the forenoon.

Mr. M'Auley had attended on the previous Saturday, the 10th March. It appears that he has only recently been appointed a justice, and was inexperienced. In his affidavit he states that he is on the rota of justices who sit at Belfast Petty Sessions on Mondays and Saturdays. In this he is apparently in error, as it appears from the rota that he is only on the rota of justices for Mondays. His first and only connexion with the prosecution as a magistrate was his presence on the Bench at the petty sessions

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K. B. Div. held on Monday the 12th March, 1917. On that day Mr. Campbell, 1917. counsel for the accused, attended for the first time. The first witness for the Crown, Concannon, was recalled and re-sworn. *R.* The written note of his evidence was read out until certain *(DOBBYN)* passages were reached when Mr. Campbell objected to the state- *v.* ments about to be read, which were very damaging to his case, on the ground that they were not evidence.

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Mr. Gray ruled in favour of Mr. Campbell's contention, but no note of that ruling appears on the deposition, nor were the excluded passages struck out. Counsel's objection was ruled on by Mr. Gray alone, without any conference with Mr. M'Auley, or any intervention or remark by that magistrate. It is stated that other objections, which arose in the course of the hearing on the 12th, were also ruled on by Mr. Gray alone, without reference to Mr. M'Auley. Concannon was cross-examined by Mr. Campbell, but Folan's evidence was read without recalling him as a witness, and the Court proceeded to take up and finally determine the case. Before deciding it was, of course, necessary to hear counsel for the defence, and it was proper that he, not having been at the earlier stages of the case, should be put in possession of the evidence taken when he had not been present. The whole difficulty arises from the course taken to put counsel for the defence in possession of the necessary facts. Mr. Gray says he was not aware that counsel was under the impression that the Court trying the case consisted of both the magistrates present until, in his closing argument, counsel addressed the magistrates in the plural. Mr. Gray, at once turning to Mr. M'Auley, asked if he intended to adjudicate. Mr. M'Auley replied in the affirmative, whereupon Mr. Gray told him that he could not do so, as the exclusive cognizance of the case was vested in him, Mr. Gray, and that he intended to adjudicate alone. Mr. M'Auley apparently acquiesced, as Mr. Gray understood, and refrained from attempting to take any part in the decision, which was pronounced by Mr. Gray, the order in the order-book being recorded as made by him alone.

On this state of facts Mr. Campbell, counsel for the prosecutor, relied on two propositions: first, that the hearing on the 12th March, 1917, was essentially a hearing *de novo*; that the various

adjournments in their nature and form of entry, and the depositions, did not confer exclusive cognizance of the case upon the justices who sat on the 26th February, 1917, and that the parties were entitled to a new hearing on the 12th March. Secondly, that the course of the proceedings and the conduct of Mr. Gray on the 12th March showed that the resident magistrate, even if he had exclusive cognizance of the case up to that date, had assented to Mr. M'Auley participating in the hearing and determination, and that once such assent had been given, Mr. Gray could not withdraw it and exclude Mr. M'Auley.

Counsel for the Crown, in addition to the negative of these propositions, argued that, even if Mr. Gray had not exclusive cognizance of the case, and Mr. M'Auley could have adjudicated, when the resident magistrate stated his intention of dealing with the case alone, there was on the facts an assent by that justice to Mr. Gray's action, and, therefore, no wrongful exclusion from adjudication.

As to the first proposition, that exclusive cognizance was not vested in Mr. Gray, the law appears to be clear. Much of the argument addressed to us on this is covered by our recent decision in *R. (Department of Agriculture) v. Derry Justices* (1). Where a case begins at petty sessions, and before the Court has taken evidence, there is a pro forma adjournment, it may be that the case could be dealt with in the general list on the adjournment day as new business, but that point is not before us. Where substantial evidence is given, it is clear from the reasoning in *R. (Department of Agriculture) v. Derry Justices* (1), and on principle, that the magistrates to hear and determine are those before whom the case began. It cannot be held that exclusive cognizance did not here attach, where material evidence was given before the original justices. Mr. Campbell's point as to the nature and form of the adjournments in the case is also covered by the decision in *R. (Department of Agriculture) v. Derry Justices* (1), where we held that such adjournments must be referred to the jurisdiction of the primary Court. It would be better, in future, in such cases if the clerk were to record in the order book such adjournments in a way which would distinguish

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(1) Ante, p. 283.

K. B. Div. the justices who made the order. I think the various orders of
 1917. adjournment, subsequently to that of the 26th February, 1917,
 R. must be read as made by Mr. Gray alone, who signed them in
 (DOBBYN) the order book.
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Supposing that exclusive cognizance of this prosecution was vested in the two justices who sat on the 26th February, 1917, had Mr. Gray jurisdiction to decide alone on the 12th March, 1917, in the absence of Mr. Macken? In my opinion he had, although in my view any magistrate who begins a case ought as matter of judicial propriety to attend until that case is determined, unless prevented by some reasonable cause. The reasonable inference to be drawn is that Mr. Macken was content to allow Mr. Gray to deal with the case alone, and having regard to the numerous adjournments his absence is reasonably explained.

On the 12th March, 1917, Mr. Gray was faced with a difficult situation. Counsel for the defence attended for the first time, and he could not be expected to know what had occurred at the earlier stages. The evidence of Concannon and Folan was accordingly read, and the crown solicitor gave a short synopsis of the steps already taken. The counsel for the accused gave valuable assistance, as he succeeded in his objection as to statements in Concannon's evidence which, if admitted, would have had a very damaging effect. Concannon was not only recalled and cross-examined, but was also re-sworn. Why he was re-sworn I do not know; perhaps it was done to enable defendant's counsel to object to his evidence, or for the purpose of refreshing his mind as to the obligation of his oath, and to assist counsel in cross-examination. Folan was not recalled, and his evidence was only read, which would have been irregular if the case was heard *de novo*, though such irregularity might have been waived.

We do not consider that anything which occurred on the 12th March operated to deprive Mr. Gray, sitting as the survivor of the primary Court of the 26th February, of his exclusive cognizance of the case. I agree, if any assent was once given, Mr. Gray could not afterwards change his mind and exclude his colleague from adjudicating. But was there any such assent? Unfortunately, Mr. M'Auley was allowed to remain on the Bench. I think it would be advisable in such cases for the justices who

do not take part in the proceedings not to remain on the Bench, or for the chairman to announce before the case is taken up that such justices, though sitting on the Bench, are not members of the Court trying that particular case. The presence of a justice who is not trying the case is likely to give rise to serious misunderstandings. It is certain that when Mr. Campbell, in his reply, used the word "worships," the resident magistrate at once intervened, and intimated that he alone could and would deal with the case, and I can find nothing to indicate that the resident magistrate at any time assented to Mr. M'Auley adjudicating. Where exclusive jurisdiction is vested in a magistrate, it would require some positive proof, such as we have not here, to show that it was surrendered to another justice. On these grounds the application must fail.

I notice briefly the last point on which Mr. Carrigan relied. Suppose that Mr. M'Auley being entitled to hear and determine, the resident magistrate ruled against Mr. M'Auley's right to participate, and that ruling was assented to by his colleague, what would be the effect of that assent? Did he acquiesce in Mr. Gray's view? Or is his conduct to be interpreted as a courteous claim of right, and his withdrawal as made under protest and tantamount to exclusion by Mr. Gray? It is not necessary to decide this question of fact, though my inclination would rather be in favour of the former alternative. If the record was completed with his tacit acquiescence, the authorities cited in Mr. O'Connor's work at pp. 24 and 171 may apply. *R. v. Williamson* (1) decides that it is a good ground for certiorari that the Court which gave the decision questioned was not properly constituted owing to the wrongful exclusion of a justice from the decision, but how is such justice to record his claim of right to decide? I think (though it is not necessary to decide) that he should make his protest openly and in terms, and it might be advisable for him to have his protest and assertion of right recorded in some way.

Of course one magistrate by entering only his own name in the order book as adjudicating could not give himself exclusive cognizance of the case; but if a magistrate is told by his colleague

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that he cannot adjudicate, and thereupon takes no part in the determination, and makes no protest or assertion of right, his conduct may be interpreted as an assent to the action of the other magistrate, and as a withdrawal from the case. Here Mr. McAuley did not insist on any right to take part in the adjudication; he says himself that if he had been informed at the opening of the case that he had no power to adjudicate, he would have left the court. Mr. Gray understood that his view was accepted without challenge. I think that, though the point does not now require decision, the defendant could not in my view of the facts rely on Mr. McAuley having been excluded within *Reg. v. Williamson* (1). The point raised by Mr. Campbell at petty sessions, that Mr. Gray could not act without Mr. Macken if exclusive cognizance had been vested in the Bench that sat on the 26th February, 1917, is, as Mr. Campbell admits, covered by the decision in *R. (Sheehy) v. Kerry JJ.* (2). This Court decided in *Reg. (Sullivan) v. Cork JJ.* (3) that where a case has been fully heard, and is only adjourned for the purpose of pronouncing and recording the determination, all the justices who heard the case must take part in the determination, though the case might be adjourned, as it was in that case, for many months. In *R. (Sheehy) v. Kerry JJ.* (2) it was held that where a case has been heard in part and adjourned, the absence at the adjourned hearing of one of the original justices will not affect the jurisdiction of the remaining members of the Court. That case is an authority binding on us.

I should like again to point out the desirability of the order book, showing in the case of adjournments of part-heard cases that the order for the adjournment was made by the competent justices, and, also, how desirable it is that justices, who do not or cannot participate in the hearing of such part-heard cases, should withdraw from the Bench (the safest course), or that the chairman of the Bench, before such cases are resumed, should publicly indicate that any such justice who may happen to be present is not to take part in the hearing. No doubt such a statement is often not made, through courtesy to the other justice so present; but

such politeness may often lead to dangerous misapprehension by the litigants and public. The difficulty arising from the presence on the Bench of magistrates not entitled to adjudicate most often comes before us on questions of bias where justices, by their conduct in remaining on the Bench, appear to the public to be members of the Court. There is, of course, no suggestion of bias in this case; the complaint is that Mr. M'Auley was not allowed to adjudicate. I have referred to this last question, as it was argued, but it does not enter into our actual decision, and what I have said only represents my present inclination of opinion.

For the reasons above given I am of opinion that the prosecutor fails on all grounds, and the conditional orders for certiorari and habeas corpus must therefore be discharged. Mr. Carrigan not asking for costs, no order will be made as to these.

KENNY and GORDON JJ. concurred.

Solicitor for the prosecutor: *Bernard Campbell.*

Solicitor for the justices: *Henry A. Wynne, Chief Crown Solicitor.*

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CORRIGENDUM.

Vol. II, page 240, line 11, omit full-stop after "shops", and for
"Title" read "cited".

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Nov. 6.

R. (JAMES WHITE) v. THE JUSTICES FOR THE
COUNTY OF CORK (1).

Justices—Jurisdiction—Petty Sessions—Certiorari—Uncertainty of Conviction—Offences charged disjunctively, and Conviction General—Fisheries (Ireland) Act, 1869 (32 & 33 Vict. c. 92), s. 16—"Erecting" or "making use of" a Fixed Engine.

A general conviction on a complaint which charges the defendant with "erecting" or "making use of" a fixed engine for the capture of salmon contrary to sect. 16 of the Fisheries (Ireland) Act, 1869 (32 & 33 Vict. c. 92), is bad for uncertainty, since "erecting" denotes an offence distinct from "making use of" under that Act and section, and, consequently, two separate offences are disjunctively charged, the conviction not stating of which offence the accused was convicted.

R. (Coyle) v. Tyrone Justices, 42 I. L. T. R. 26, distinguished.

MOTION to make absolute a conditional order for a writ of certiorari to bring up and quash an order of conviction made against the prosecutor, James White, and one, Patrick Regan, by the justices of the peace for the county of Cork, sitting at petty sessions for the district of Passage West, on the 18th April, 1916.

The prosecutor, James White, and Patrick Regan, were charged by George Futter, secretary of the Cork Board of Fishery Conservators, No. 5 District, in a summons as follows:—
"That on the 15th day of March, 1916, at Monkstown, you, the said defendants, did unlawfully in that portion of the River Lee, off Monkstown, make use of or erect a fixed engine for the capture of salmon without having obtained a certificate from the special commissioners for Irish fisheries under the provisions of the Salmon Fisheries (Ireland) Act, 1863, or a certificate from the inspectors acting in execution of this Act in regard to such fixed engine, viz. a net (32 & 33 Vict. c. 92, s. 16)."

The case was heard at Passage West petty sessions on the 18th April, 1916. It appeared from the affidavit of Captain O'Driscoll, chairman of the Bench, which was filed to show cause,

that the following evidence was given by the prosecution:— *K. B. Div.*
 On the night of the 14th March, 1916, the police at Monkstown observed a boat containing two men stationary in the River Lee. The boat remained in the same position for some time, and the men in her were observed to be putting something into the water. Early on the morning of the 15th March, 1916, the two defendants to the complaint were observed to leave the shore in the boat which had been under observation the previous night. The boat had been searched by the police and found to be empty. When the two defendants returned to the shore they were accosted by the police and were found to be in possession of freshly caught salmon and of a net of illegal dimensions.

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The justices convicted both White and Regan, the curial part of the order being as follows:—"Defendants convicted and ordered to pay for fine the sum of £50 each."

James White applied for and obtained a conditional order for a writ of certiorari to quash the conviction on the ground "that the said order of conviction is bad for uncertainty, inasmuch as the said charge of making use of and erecting a fixed engine are [*sic*] laid disjunctively in the said summons, and the said order does not specify upon which charge the conviction was had."

James Rearden, for the prosecutor:—

The conviction is bad for uncertainty; there are two separate offences stated disjunctively in the summons, and the conviction is general. The section under which the prosecutor was charged names three distinct offences, i.e., "fishing with," "erecting," or "making use of" a fixed engine. No doubt, the penalties are the same for each of these offences; but the fact that three several modes of unlawfully taking salmon are by one section punished in the same way does not make those modes alternative descriptions of one single offence. The test in every such case is whether the same evidence is sufficient to prove any one of these three modes of unlawful capture; and it is clear that there might be evidence sufficient to prove one mode which would be quite inadequate to prove another. Suppose the prosecutor had actually been caught erecting a net. No doubt if he were charged with erecting a fixed engine, the evidence would support a conviction; but could

K. B. Div. he be convicted of using a fixed engine? There would be no
 1916. evidence of user, though abundant evidence of erection. By this
 R. test it is demonstrated that the section deals with several offences
 (WHITE) and not with several descriptions of one offence; and the law is
 v. clear and well settled, that where several distinct offences are
 JUSTICES OF disjunctively charged a general conviction is bad for uncertainty:
 Co. CORK. *R. v. Wells* (1); *R. (Vaughey) v. Meath Justices* (2); *R. v. Morley* (3);
R. v. Sadleir (4); *R. v. North* (5); *R. v. Pain* (6); O'Connor's
Irish Justice of the Peace, vol. i, p. 217.

J. M. FitzGerald, for the justices:—

The only question is whether the section deals with one offence, i.e., unlawful capture of salmon with a fixed engine, or with three different offences. The point is covered by authority, for in *R. (Coyle) v. Tyrone Justices* (7) this Court decided in the case of a prosecution under this very section that "making use of" and "fishing with" a fixed engine were one offence and not two separate offences; and *R. (Patterson) v. Tyrone Justices* (8) is a recent case on the subject of disjunctive charges which on analogy supports the view taken by the justices.

James Rearden, in reply:—

In *R. (Coyle) v. Tyrone Justices* (7) "erecting" was also charged; but that being a case dealing with a drift net, the Court expressly eliminated the charge of erecting as surplusage, being inapplicable to the net in question, and the point whether "erecting" is the same offence as "making use of" is left open by that decision. *R. (Patterson) v. Tyrone Justices* (8) is distinguishable, and must be read with the Act and section with which it dealt. The enactment under which the prosecutor was there charged really dealt with the unlawful possession of Government property; there was but that one offence, though the section in question described various ways in which the unlawful possession might be obtained.

(1) 20 Cox 671.

(2) 38 L. T. R. 12.

(3) 1 Young & Jervis 221.

(4) 2 Chitty 519.

(5) 6 D. & R. 143.

(6) 7 D. & R. 678.

(7) 42 L. T. R. 26.

(8) [1915] 2 L. R. 162.

CHERRY C.J. :—

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The decision of this case depends upon the construction put upon sect. 16 of the Fisheries (Ireland) Act, 1869 (32 & 33 Vict. c. 92), which provides penalties for the unlicensed making use of, erecting, or fishing with a fixed engine for the capture of salmon. The summons charged the prosecutor with two only of the alternatives mentioned in the section, viz., the "erecting" or "making use of" a net contrary to the statute; and the justices' order upon that summons was a general conviction, and the imposition of a fine in general terms.

There is a long line of authorities establishing that where different offences are disjunctively stated in a summons, a general conviction on such summons, which does not specify to which of such offences it relates, is bad for uncertainty. The question here is, therefore, Are there two different offences stated in the summons on which the prosecutor was convicted, or are there merely two different modes of describing the one single offence stated in the alternative?

In *R. (Coyle) v. Tyrone Justices* (1) it was judicially decided that where a summons charged the defendant with "making use of, or erecting, or fishing with" a net, only one offence was charged; but that was a case relating to a drift-net, and the Court rejected the word "erecting" as being inapplicable to a net of that description, so that the question here raised is not covered by the authority of that case. Here we have to decide whether the phrase "making use of" describes the same offence as the word "erecting." In my opinion it does not. The alternatives here set out in the summons describe separate and distinct offences. It has been demonstrated in argument that a person might be convicted of either separately on evidence which would be insufficient to convict him of the other. That being so, the order of the justices is, in my opinion, bad. It should have stated of which offence or offences the accused person was convicted.

(1) 42 I. L. T. R. 26.

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DODD J. :—

My attitude in this case may be best described by saying that I do not dissent from the judgment of the Lord Chief Justice; but, while I do not dissent, I desire to point out that it is because I am bound by the previous decisions of this Court, so far as they are applicable to this case. Should the matter for decision in this case be at any time more fully raised in circumstances by which I should not be so bound, I desire to clearly point out that I wish now to reserve my right to decide without being bound by my concurrence in the present judgment.

If the matter before us was raised *de novo*, I should be inclined to hold that only one offence is contemplated by the section, namely, the unlawful capture of salmon, and that whether that be by the erection of, the making use of, or the fishing with, a fixed engine, one consequence results, that is the forfeiture of the engine. The justices can, no doubt, impose in addition the penalties provided by the statute; but, in my opinion, the section provides a single result, no matter what the mode of unlawful capture may be, and the punishment for the single offence is forfeiture of the engine. I am bound, however, by the decisions of my predecessors, in which a different view has been taken of the provision; and, that being so, upon that view I do not see my way to dissent from the Lord Chief Justice.

Solicitors for the prosecutor: *Wynne & Wynne.*

Solicitor for the justices: *P. F. Donegan.*

C. N. K.

THE MASTER AND OWNER OF THE SCHOONER "B 1" v. THE YOUGHAL URBAN DISTRICT COUNCIL (1).

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Admiralty.
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Feb. 23.

Practice—Security for Costs—Admiralty—Or. 59, rule 52.

In the case of a vessel registered as British, whose owner resides within the jurisdiction, an order for security for the costs of an appeal brought by the owner will not, in the absence of special circumstances, be made.

SUMMONS.

A suit was brought in the Cork Local Admiralty Court by Captain David Donovan, as master and owner of the schooner "B 1," against the defendants to recover £192 12s. 8d. for damage alleged to have been sustained by the vessel while lying alongside a berth in Youghal Harbour, which berth was alleged to have been defective and unsafe. The suit was heard by the Recorder of Cork, assisted by a nautical assessor, on the 17th and 18th January, 1917, and was dismissed on the merits. From this decision the plaintiff appealed, whereupon the defendant issued summons for security for costs.

The "B 1" was a British registered ship, and her owner was resident in Youghal, within the jurisdiction.

Moloney, in support of the summons:—

Order 59, Rule 52, empowers this Court to make an order for security for costs in all cases in which it may think fit. Ships are easily removed, and may be destroyed. If the "B 1" is taken out of the country, or sunk by a submarine, or wrecked, the respondents may have no fund out of which to realize the costs if they are successful. This Court made an order for security in the case of *The Combermere* (2). The power given by the rule is very wide, and should be exercised for the protection of respondents.

(1) Before GORDON J.

(2) Unreported.

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FitzGibbon K.C. (with him *Hungerford*), for the appellant :—

Under the Court of Admiralty (Ireland) Act, 1867 (30 & 31 Vict. c. 114), sect. 87, and G. O. 235 of 1867, the former Court of Admiralty had a discretion as wide as or wider than that conferred by Order 59, Rule 52, R. S. C., 1905. The practice of that Court is stated in Mr. Justice Boyd's Admiralty Practice (at pp. 41-43). Security for costs was not ordered in the case of a British ship or a British subject unless he was a pauper. The "B 1" is a registered British ship, and her owners reside in Youghal. The value is stated to be at least £2000. If the former practice of the Court of Admiralty is to prevail, this is not a case in which that Court would have ordered security, as the ship is British, and the owners are not paupers. If the practice of the Division in which the Court of Admiralty is now merged is to be followed, this is not a case in which the King's Bench Division would order security. The *Combermere* was an Italian ship.

GORDON J. :—

The rule under which Mr. Moloney applies is very general in its terms. There is nothing in it to indicate that any particular case must be brought within any special set of facts ; and, as far as I can find out, there is no decision to guide the Court in making an order. Speaking generally, it is a fundamental principle that every British subject resident within the jurisdiction should be at liberty to prosecute litigation to the highest Court in the land, without being put to the necessity of giving security for costs, though, of course, there are statutory and other exceptions. The fact that these proceedings were, for the sake of economy and convenience, instituted in the local Admiralty Court, does not, in my opinion, make any difference. If the plaintiff had chosen to proceed by action at common law in the Superior Court, as it is conceded he might have done in this case, and had failed in his action before a judge and jury, or a judge without a jury, no order for security for costs would have been made against him as a condition precedent to an appeal. Why should a litigant who has chosen to proceed on the Admiralty side be put in any less advantageous position ? If it had been intended that security

should be given in every case of appeal, this could have been easily provided for. The rule is framed sufficiently widely to give a judge a discretion to make an order requiring security when he thinks it just that it should be given, but that discretion ought not to be used to embarrass a litigant unduly. It is not alleged that the plaintiff has no means except his ship, even if (a possibility that was suggested at the Bar) she should unfortunately come to grief; and no grounds of any special nature are relied on for requiring security. I do not think I would be exercising my discretion wisely if I put difficulties in the plaintiff's way that the circumstances of the case, as presented, do not warrant, and I therefore make no rule on the defendant's application. Costs of the plaintiff to be costs in the cause.

Solicitors for the plaintiff: *J. & J. Bennett.*

Solicitors for the defendant: *A. H. Allen & Sons.*

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Appeal.
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ROURKE, APPLICANT; HOLT & CO., RESPONDENTS (1).

Feb. 2.

*Master and Servant—Compensation—Accident—Disappearance of Seaman—
No direct Evidence—Onus of Proof—Workmen's Compensation Act,
1906 (6 Ed. 7, c. 58), sect. 1, sub-s. 1.*

A seaman disappeared during his spell of duty at the wheel in the wheel-house in the centre of the flying-deck, and was not afterwards seen. The night was rough, the sea choppy, but the vessel was steady. The flying-deck was protected by a railing. There was no direct evidence as to how the man came by his death, and, in spite of the presumption against suicide, the County Court Judge was unable to draw the inference that the death was due to an accident; and he found as a fact that the death was not the result of an accident arising out of and in the course of the deceased's employment.

Held, that the finding of the County Court Judge simply meant that the onus of proof on the applicant for compensation had not been discharged, and that in the circumstances his conclusion was right.

APPEAL from an order of the County Court Judge of Louth, sitting as arbitrator under the Workmen's Compensation Act, dismissing the claim of Mary Rourke, widow and dependant of Peter Rourke, deceased, for compensation. The grounds upon which the appellant asked that the dismiss be reversed were that the learned County Court Judge was wrong in law, and misdirected himself; that there was no evidence, and no sufficient evidence to justify his findings; and that there was sufficient evidence to find that the appellant was entitled to compensation.

The deceased was a seaman, employed by the respondents on board their vessel, the S.S. "Eumæus." On the 15th August, 1916, the S.S. "Eumæus" left Liverpool for Java. On that day Peter Rourke's spell of duty was from 8 p.m. to 12 p.m., and from 8 p.m. to 10 p.m. he was bound to be at the wheel in the wheel-house in the centre of the flying-deck. The first and third officers were also on the flying-deck—one on the starboard, and the other on the port side. They were on the look-out for submarines and signals. The captain, who was also on the flying-deck for some time, left it shortly before 9.30 p.m., and went to his cabin.

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Soon afterwards he heard a scurrying overhead in the wheel-house. He rushed back immediately to the flying-deck, to find that Rourke had disappeared, and that one of the officers was at the wheel. The first officer had steadied Rourke between two lights which were ahead. About 9.30 p.m. he saw a suspicious light, and sent the third officer, who was on the starboard side, into the chartroom to interpret the signal. He next noticed that the vessel seemed to be swinging between the lights ahead. Where he was on duty was about 10 feet from the wheel-house. He ran into the wheel-house between 9.30 and 9.35 p.m., and found it empty. Shortly after 9.30 the quartermaster saw Rourke at the wheel. Rourke was not afterwards seen alive, and his body was not recovered.

The captain, in his evidence, said he concluded that Rourke had committed suicide, and had not fallen overboard by accident. The deceased appeared to have been recovering from the effects of a big drinking bout. The night was not stormy; it was rough, dark, and drizzling; the sea was choppy, but the ship was not rolling; it was quite steady. Rourke was doing his duty at the wheel badly, but not so badly that it was necessary to remove him. There were two doors to the wheel-house—one at the port, and the other at the starboard side. There was a solid railing round the flying-deck, boarded in from 3 feet to $3\frac{1}{2}$ feet high.

The County Court Judge came to the following conclusion:—
 “In spite of the presumption against suicide, I found myself unable to infer from the evidence that the death of the deceased was due to an accident. I also found as a fact that said death was not the result of an accident arising out of and in the course of his employment.” He, accordingly, dismissed the application.

Wylie K.C. and *Sainsbury*, for the appellant:—

The applicant excluded every possibility except accident or suicide, and, as there was no evidence to rebut the presumption against suicide, the inference is that the death was caused by an accident arising out of and in the course of his employment. The burden of proof, in this case, rested, not on the applicant, but on the respondents. The onus of proof may be shifted when the claim is by a dependant, and where facts are proved from

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which a natural and reasonable inference is that the accident happened whilst the deceased was engaged in the employment: *Grant v. Glasgow and South-Western Railway Company* (1). The dependants have not in every case to furnish direct evidence of death: *Proctor v. S.S. "Serbino"* (2); and very slight facts suffice as a basis for very wide presumptions: *Lendrum v. Ayr Steam Shipping Company* (3). The unexplained disappearance of a seaman from a ship at sea has been held to be a sufficient ground for inferring that he accidentally fell overboard, and met his death by accident arising out of his employment: *Swansea Vale (owners) v. Rice* (4); *Mackinnon v. Miller* (5). In *Bender v. Owners of the Steamship "Zent"* (6) a finding of the County Court Judge in favour of the applicant for compensation was reversed on the ground that there was no evidence which would enable the Court to draw the necessary inference.

Hanna K.C. and Dockrell, for the respondents:—

All that the County Court Judge found in this case was that the onus of proof had not been discharged by the applicant. In applications under the Workmen's Compensation Act the applicant is in the same position as the plaintiff in other cases. He must prove his case; he must do something more than show a state of facts which is consistent either with one view or with another view: *Barnabas v. Bershaw Colliery Company* (7), per Loreburn C.; propositions must be proved in a Court of law by evidence, and that is not satisfied by surmise, conjecture, or guess; per Lord Halsbury in the same case.

This case is governed by *Marshall v. Owners of "Wild Rose"* (8), and also by *Gatton v. Limerick S.S. Company* (9). Even if the County Court Judge had found that Rourke had met his death by an accident, there would still remain the question whether it arose out of the employment.

- (1) 1 B. W. C. C. 17.
(2) 8 B. W. C. C. 572; [1915]
3 K. B. 344.
(3) 7 B. W. C. C. 801; [1915]
A. C. 217.
(4) [1912] A. C. 238.

- (5) 2 B. W. C. C. 64.
(6) [1909] 2 K. B. 41.
(7) 4 B. W. C. C. 120; 103 L. T.
513.
(8) [1910] A. C. 486.
(9) [1910] 2 I. R. 561.

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In this case we cannot interfere with the finding of the County Court Judge. The post of duty of the deceased was at the wheel and to steer a certain course until ordered to change it, but nobody knows how the man disappeared, or how he came to leave his post. It is conceivable that he may have fallen overboard in such circumstances as to entitle his widow to claim compensation on the ground that his death was due to an accident arising out of and in the course of the employment; but the onus of proof is on the applicant. That onus is not discharged by asserting that we must assume that the deceased was at his allotted employment when he fell overboard, although the natural inference would be that he was not, and that we should then draw the conclusion that the accident arose out of and in the course of the employment. The County Court Judge found that there was no evidence which would enable him to draw such an inference. Having eliminated suicide, he appears to have been of the same opinion as was expressed in *Bender v. Owners of Steamship "Zent"* (1), by Farwell L.J., in the following passage :—" I fail to see how one can possibly say that the onus has been discharged, when the only evidence is that the last that was seen of the cook was that he was looking over the side. This is consistent with a number of things, but, so far as I can see, it is difficult to find anything arising 'out of' the employment with which it is consistent. I do not myself suggest suicide, because suicide, being a crime, the presumption is against it." This is what the County Court Judge says in the present case, and can we say that as an arbitrator he was not entitled to come to that conclusion? He simply held that the onus on the applicant had not been discharged. In my opinion he was right in that view, and the appeal must be dismissed.

RONAN L.J. :—

The notice of appeal is based on the ground that the County Court Judge was wrong in law, and misdirected himself. He says that " in spite of the presumption against suicide I found myself unable to infer from the evidence that the death of the deceased was due to an accident " ; and he goes on to say that he found as a

(1) [1909] 2 K. B. 41, at p. 45.

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fact that the death was not the result of an accident arising out of and in the course of the employment. These findings are findings of fact. The judge has not stated or found that there was no evidence which would have entitled him to come to a contrary conclusion. He finds as judge of fact that the applicant has not satisfied him that the death was the result of an accident arising out of and in the course of the employment.

Unless he was bound as a matter of law to come to a contrary conclusion, there was no misdirection or error in law.

Although I was much impressed by the argument of Mr. Wylie, I am of opinion that there was ample evidence, notwithstanding the presumption, to justify a tribunal of fact in coming to the conclusion that it was a case of suicide. The "Eumæus" was a large steamer, equipped in the ordinary way with a bridge, wheel-house, and chart-house. There is no suggestion that the ship was not in a proper condition. It is reasonable to assume—and I do assume—that the railing around the flying-deck was adequate for the protection of seamen. The sea was rough and choppy; but the vessel was not rolling. In fact, according to the evidence of the captain, the vessel was quite steady. In these circumstances how can it be assumed, in the absence of evidence, that the man fell overboard by accident? The captain says he had noticed that Rourke was recovering from the effects of a "big drinking bout." The County Court Judge was at liberty to accept that evidence as an accurate description of the man's condition, and as proof that the vessel was quite steady.

Further, it must be remembered that it was this man's duty not to leave the wheel; yet, for some mysterious reason, and without any notice to the two officers on the flying-deck, he left his post at a most critical moment, and appears to have gone to a part of the vessel where he had no business to be. On all these facts I am unable to accept Mr. Wylie's proposition that the County Court Judge was bound as a matter of law to find that this man met his death by an accident arising out of and in the course of his employment.

MOLONY L.J. concurred.

Solicitor for the appellant: *P. Tallan.*

Solicitor for the respondents: *F. G. McKeever.*

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Easement—Water—Right to draw Water from an enclosed Well—Dominant and Servient Tenement held under same Landlord—Demise—Reservation of “all Waters and Watercourses in or adjoining the demised premises”—Lost Grant—User—Trespas.

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A and B were tenants of the same landlord. A held under a yearly tenancy, created on the determination in 1889 of a lease of 1851, which excepted to the lessor “all waters and watercourses in or adjoining the demised premises,” with liberty to the lessor to turn and dispose of such waters and watercourses. B had held 61 acres as tenant from year to year. In 1884 he was ejected on notice to quit, 21 acres of his holding being demesne lands. After being out of possession for about eighteen months, B obtained a tenancy from year to year in 40 acres of the original holding at a rent of £30 subsequently fixed, by fair rent order, at £21; and he later obtained a grazing letting of the remaining 21 acres at a rent of £21, subsequently reduced to £10. There was an enclosed well on A's land, out of which some four or five families admittedly regularly took water, B's family being amongst the number. To an action of trespass brought by A, B in his defence relied on a claim of right, founded on lost grant or alternatively upon a demise, to take water from the well on A's land, and counterclaimed for interference by A with the exercise of the right claimed. The action and counterclaim were tried by Gibson J. without a jury. The plaintiff relied on evidence.

Held, by the learned judge at the trial, that the reservation contained in the lease of 1851 did not include the water in the well, and that therefore the defendant B could not claim a right to the water by demise from the common landlord; that owing to the break in B's tenure, evidence of user prior to his new tenancy in 1886 was not admissible; that on the evidence the taking of water by the defendant from the well in question was permissive and not of right; that B had not proved facts from which a lost grant could be presumed, and that verdict and judgment should be given for A in the original action, and against B on the counterclaim.

On Motion by the defendant to set aside the verdict and judgment, *Held*, by the Divisional Court (Cherry L.C.J. and Boyd J.), 1. that, even assuming

(1) Trial of Action: Before GIBSON J. New Trial Motion: Before
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 that the water in the well was included in the reservation in the lease of 1851, there was no evidence of a demise to B of a right to take water from the well; and 2, that even if evidence of user prior to 1886 was admitted, the learned judge at the trial had evidence upon which to found his findings of fact that the user proved was permissive, and that these findings, not being against the weight of evidence, the verdict and judgment entered for the plaintiff and against the defendant in the action must stand.

On Appeal, *Held*, that on the true construction of the lease of 1851 the well, together with the waters therein, were excepted to the landlord, that the user of the well by the defendant was lawful under the permission of the landlord, and that the action ought to be dismissed.

TRIAL OF ACTION.

The state of the title on both sides, and the conclusions of fact drawn by Mr. Justice Gibson at the trial, are sufficiently set out in his judgment.

Serjeant Matheson K.C., Serjeant A. M. Sullivan K.C., and T. Sullivan, for the plaintiff.

H. D. Conner K.C., P. D. Fleming K.C., and Peart, for the defendant.

GIBSON J. :—

This action relates to a claim by the defendant to take water from a well on plaintiff's land, and arose out of a quarrel about the plaintiff's brother Pierce having bought a farm in 1912 in which the Leonards were interested. Up to that period there was apparently no dispute or obstruction on the plaintiff's part. He alleges that since then the defendant has greatly increased the amount of water taken, and that the plaintiff was exposed to trespass from the gate communicating with the approach to the well being left open. The ill-feeling on the defendant's side is certain.

The state of the title on each side is as follows:—Both holdings are on the Barry estate, and are held under a common landlord. The plaintiff's land, consisting of 173 acres, was demised by lease, dated 6th May, 1851, to Redmond Reali for the life of Joseph Reali (who died about 1900), or twenty-one years. It excepted "all waters and watercourses in or adjoining the said premises,"

with liberty to turn and dispose of the said waters and water-courses. The overflow from the well in dispute made its way to a stream, which after passing portion of defendant's holding, reached the landlord's demesne. The well (of which a plan was proved) was surrounded with a stone construction, and approached by a step. On the 13th April, 1895, Joseph Reali, son of the lessee, in whom the tenancy was then vested, settled the property on his son Redmond Reali, and the trustees of the settlement sold the lands, on August 24th, 1908, for £1325 to plaintiff's father, T. Whelan, who assigned same to plaintiff on 13th April, 1910. A first judicial rent was fixed (during the continuance of the lease) on 29th October, 1887, a second on 30th May, 1905. Since 1887 there has been, therefore, a yearly tenancy on the terms of the lease: *Carrickfergus U.D.C. v. Martin* (1).

The defendant's holding of 61 acres represents what was a yearly tenancy, held by Cornelius Heffernan, who, dying in 1857, was succeeded by his widow. The defendant's father got the place in 1865, and defendant, on his marriage in 1872, became owner. The landlord brought an ejectment, on notice to quit, on 13th October, 1884, and got judgment on 14th November, 1884, the defendant not being able to claim protection of the Act of 1881, as 21 acres of the farm were demesne lands. He claimed for disturbance, and got in settlement £400. Having been out of the lands for one and a half years, he was let back as tenant into possession, in 1886, of the 40 acres, and, some few years after, got the 21 acres as a grazing letting. The old rent of the entire holding was £61 18s. The new rent of the 40 acres was £30, and the rent of the twenty-one acres was £21. A fair rent of £21 was fixed on the 40 acres on the 17th February, 1906. The rent of the demesne portion now in force appears to be £10.

No authority was cited at the trial. It was assumed that the exception in the landlord's favour included the well, and I was disposed to take that view, which, if well founded, might assist the defendant. On consideration I am inclined to a different construction. The land was obviously grazing land; the use of spring-water was essential for house and dairy purposes. The

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(1) [1906] 2 I. R. 79.

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exception should be construed against the lessor: *Savill Bros. v. Bethell* (1); see also *Ireland v. Livingston* (2); and it should not be read, unless the language is precise, in a sense which would interfere with the reasonable enjoyment of the subject-matter demised. The words "waters" (not "water"), "watercourses," and "adjoining," this last an inaccurate expression, "with power to turn and dispose of the waters and watercourses," point rather to running water (there were no lakes or ponds on the lands) than to a well-spring, though the overflow, forming a rill or stream, having individual separate existence would be captured. If "waters" includes all water, the addition of "watercourses," if the latter term means streams, could have no separate effect. Whether "watercourse" means the channel or the stream therein, or includes both, the fact that the expression is used on the context suggests limitation of "waters." (See Norton on Construction of Deeds, ed. 1906, at p. 213, as to the principle of construction where wide expressions are followed by more special language.) No doubt a lease may be framed so specifically as to leave the lessee at the mercy of his lessor, as in *Anderson v. Cleland* (3), a case where the landlord contemplated building. The judgment of Holmes L.J., at p. 371, has some bearing on the present point. I have found no case relating to a well, save *Hipkins v. Birmingham Gas Co.* (4), which was decided on a statute containing the words "place of water" after an enumeration of particulars. The general word "waters" must receive some kind of restriction, and cannot fairly be extended in such a way as to make it impossible for the lessee to get water for drinking or dairy if the lessor chose to forbid it. No argument was addressed to this question of construction. Dealing with an *exception* in the lessor's favour, the language must be strictly construed, as is laid down in Norton on the Construction of Deeds, p. 119, and *Savill's Case* (1). Where general words are followed by specific words the latter may have a restrictive operation. "Watercourse" suggests a channel or stream of moving visible water.

Assuming that the well, constructed as described by the witnesses, passed under the lease to the lessee, whose lease was in

(1) [1902] 2 Ch. 523.

(2) L. R. 5 H. L. 395.

(3) [1910] 2 I. R. 334.

(4) 5 H. & N. 74.

force till 1887, the defendant's case must depend on whether a lost grant by the plaintiff's predecessors can be inferred after 1886, when the new letting of part of defendant's holding was made. Such title must be founded on user as of right for at least twenty years, and must rest on inference of fact, not on presumption of law. As to this the Irish authorities are in conflict with the opinions of the English judges: *Kilgour v. Gaddes* (1). I must, of course, follow our own decisions. On the facts, the defendant's land being vested in the common landlord for one and a-half or two years before 1886, statutory prescription is excluded.

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As to lost grant, where the user relied on as the basis of such grant is for twenty years (not forty years and upwards), if the commencement of the user is fixed and the person to whom the grant is attributed is known, it would appear that if the conclusion of fact is that no actual grant was made there would be a difficulty in presuming a lost grant. Otherwise a rebuttable presumption of fact would be turned into a positive conclusion of law, which would make in such case statutory prescription unnecessary. The Prescription Act was, however, intended for the benefit of those claiming easements and to simplify means of proof. Where lost grant is relied on, the issues should be kept clear of the Prescription Act, especially where the user is for twenty years, and should not be put in the terms of the statute, as has been done in some cases.

On the hypothesis that the well was excepted to the lessor, the defendant's position would be more favourable. He might, in that case, rely, not merely on lost grant by Barry, but also on demise by Barry. If the lessor owned the well (as to which he never exercised any apparent right of ownership), did he release such rights or lose them by being dispossessed? The latter alternative would be difficult, particularly having regard to the fair rent orders, which assume the continuous identity of the holding. If the presumption of release is to be drawn in order to refer the user to a legal origin, must not such release have been in favour of the lessee? Take it that there was a demise of the right to take water for his holding to the defendant, there must be an equivalent right in the lessee, whose user had been continuous

(1) [1904] 1 K. B. 457.

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and unbroken. On the assumption that both the lessee on the one side and the defendant and his predecessors on the other, had legal rights, were such rights to water-supply equal and concurrent? or had the lessee superior rights, a kind of debenture charge on the water, so that if in dry weather the supply failed he was entitled to what was there? Is the supposed demise of such appurtenant rights to the defendant to be restricted to a supply after plaintiff's requirements were satisfied, or to a period of the year when water was abundant? The defendant's case is, that he was entitled to take water at all times and in all conditions.

His Lordship, having analysed the evidence of the witnesses in some detail, proceeded:—

On the evidence, I have come to the conclusion that the well, of late years, was in general use by many families, as well as by the defendant, and that whether the gate for a long period was locked by Joseph Reali in summer or not, since Redmond Reali became owner in 1895, there was effective locking on three occasions, namely, that referred to by Mrs. Noonan, fifteen years ago, the shutting with which Gallagher was connected, and the locking on the occasion of the sale, in 1908. This last may not be so material, as the act may have been to prevent trespass while the premises were vacant pending sale, though possibly it may have been to assure intending purchasers that the passage was private and there was no right of way. The occurrence with which Gallagher was associated, following the previous locking mentioned by Mrs. Noonan, is much more important. Had the defendant admitted the locking and made the case that the gate was opened on his demand, the transaction might not have been inconsistent with a claim of right, though it would not be what Mr. Reali, if his memory is accurate, describes. But the defendant wholly denies that he knew of any obstruction at all before 1914, and as to his interview with Mr. Reali can only say that he does not remember. The defendant's daughter Margaret's version is quite inconsistent with Reali's and also with M'Carthy's account. That locking was no new thing before defendant's eviction appears from the evidence of Mr. Reali and O'Keefe. I am satisfied that the gate was locked; that

defendant knew that Reali claimed the right to do this; that it was opened, through the instrumentality of Gallagher, at defendant's request, and that there was such a conversation as Mr. Reali described. I cannot believe the locking in Joseph Reali's time was altogether a fiction, invented by Mr. Redmond Reali, though it may not have been so regular as he described, and of late years may have been frequently omitted.

As to the effect of locking of a gate, where it is submitted to, in relation to a claim to user as of right, *Barry v. Lowry* (1) is a strong authority. Whether it was rightly decided on the facts may be a question, but it binds me. It applies here where defendant never had a key, and was as to user in much the same position as other neighbours. The well was not a public well. I am of opinion that if, as I hold, the well was included in the lease, no lost grant by Joseph Reali, after 1886, can, on the facts, be properly inferred or presumed. As Lord Lindley observes, in *Gardner v. Hodgson Brewery* (2), a lost grant is only available where the enjoyment cannot otherwise be reasonably accounted for. On the assumption that the well in 1886 was vested in the landlord, or at least the water-supply enjoyed by the defendant's holding, the defendant's claim would be more plausible, but I should find it difficult to establish it. The right put forward is to take water at all times of the year; and the history of the holdings, and the acts of the parties, are incompatible with user as of right, or make it unlikely. The cutting of the holding in two increases the difficulty. The case involves so many legal questions that the parties agreed to have the jury discharged. My conclusion is arrived at reluctantly, as the defendant, with the others, has had the benefit of the well so long, and is willing to have the gate locked if he is given a key. The dispute never would have come into being but for the ill-feeling generated by Pierce Whelan's purchase of the Leonard farm.

On the above findings on fact and decision in law the learned judge gave judgment for the plaintiff on the original action for 1s. damages, with costs, and against the defendant on the counterclaim, with costs.

(1) 1. R. 11 C. L. 483.

(2) [1903] A. C., at p. 240.

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MOTION by the defendant to set aside the judgment and verdict, or for a new trial of the action, on the ground that the learned judge was wrong in law, and misdirected himself in the application of the law to the facts proved, and that his finding and judgment were against evidence.

H. D. Conner K.C., P. D. Fleming K.C., and Peart, for the defendant.

Serjeant Matheson K.C., Serjeant Sullivan K.C., and T. Sullivan, for the plaintiff.

The arguments sufficiently appear from the judgments.

CHERRY L.C.J. :—

In this case many very interesting topics, both as to the law governing easements, and relating to their acquisition by lost grant, have been raised; but the view we take of the case depends upon a single finding of fact, and the way in which the learned judge found that at the trial concludes in our view the law.

The action was one of trespass. The plaintiff and defendant held under the same landlord; they were tenants of the same estate—a fact which has an important bearing on any claim to an easement by one over the lands of the other. The plaintiff held under a lease of the 5th May, 1851, to Redmond Reali, made for a life or twenty-one years. That lease expired in 1910; but there is no question that, on its expiration, a yearly tenancy on the terms of the lease came into being. On the 13th April, 1895, Joseph Reali, then the tenant, assigned the holding in trust for his son Redmond Reali, by whom it was held until 1908, when the holding was sold to the plaintiff's father, who, on the 13th April, 1908, assigned it to the plaintiff. It is important to note that Redmond Reali was for thirteen years the tenant of the holding, since, to my mind, the case turns upon the evidence he gave at the trial.

The defendant's title is as yearly tenant, and the tenancy goes back to the year 1872, when the tenancy was assigned to the defendant. Although he became tenant in 1872, there was an interruption of his user of the right claimed in 1884 when he was evicted on a notice to quit. On resuming possession, he only took

up portion of the lands, the residue being demesne lands. The defendant was out of possession for about eighteen months after the ejectment; and in 1886 there was a re-letting to him of a portion of the holding, about 40 acres. A good deal turns on this, as it was treated as a ground for not admitting any evidence of user prior to 1886. I do not altogether agree with this view, because, if the question is whether the lands were demised originally to defendant with the right claimed, I think the defendant would have got the same rights under the re-letting as he had under the prior title, and thus evidence of user prior to 1886 would be admissible.

The defendant founded his case not upon prescription by statute, but upon lost grant and a demise of the right. That depended upon the lease under which defendant held, for if that lease gave the plaintiff the absolute disposal of the water, it would be impossible for the defendant by user to so claim the right if the user was permissive. It is necessary, therefore, to consider the lease to the plaintiff. It was argued that the water in the well was reserved by the lease in 1851, and was the subject of demise to the defendant under the agreement of tenancy made with him in 1886. The exception in the lease to the plaintiff is in these words:—"Excepting and reserving all waters and water-courses in or adjoining the premises." It is argued that "waters" includes the well in question. Apparently that was the view of the learned judge at the trial, but afterwards he came to the conclusion that the word "waters" did not include the well, and that the latter passed to Redmond Reali, the lessee. If that construction be correct on the findings, it disposes of the whole case; but I am willing to assume the construction first put upon the exception by the learned judge, and which Mr. Fleming argued is the true construction. I assume that by the lease to the plaintiff's predecessor in 1851 the right to the water in the well was reserved and might have been demised to the defendant in 1886. But what evidence is there of such demise? The only evidence there could be is that of user: there was evidence of continuous user before and after 1886. On the other hand, there is positive and clear evidence on the plaintiff's side that the user was permissive and not of right. The only evidence on which the defendant

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K. B. Div. can rely is user, as no one was called from the landlord's office,
 1915. and there is no other evidence in the case. It was essential to
 WHELAN defendant to prove user as of right, and not by permission.

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The most important witness was Redmond Reali, who gives positive evidence of the locking of the gates, and of permission to obtain water being requested and given. He said that during the summer months the gate was continuously locked, and access was denied. I gather as a fact that he allowed Leonard and others to take water, but in general the right of access was discontinuous. He also proves messages from Leonard to himself for permission, and that Leonard thanked him for permission given. If that evidence be true, it completely disposes of the defendant's case. It is true that the defendant positively denied all this, and said that he took water always when he wanted it. It was open to the judge to believe or disbelieve Reali, and, if he did believe him, we cannot set aside the verdict. The user was a question of fact, and the judge was by consent of the parties the person to determine it. It is quite clear the learned judge intended to decide and did decide that the conversation deposed to by Reali did take place, and that permission was asked for and given. That is sufficient to base the finding that defendant's user was permissive and not as of right. The learned judge says: "I am satisfied that the gate was locked; that defendant knew that Reali claimed to be entitled to do this; that it was opened, through the instrumentality of Gallagher, at defendant's request"—all findings of fact—"and that there was such a conversation as Mr. Reali describes." Then, at the end of his judgment, the learned judge gives his opinion as to two matters; he says: "I am of opinion that if, as I hold, the well was included in the lease, no lost grant from Joseph Reali after 1886 can, on the facts, be properly inferred or presumed. As Lord Lindley observes, in *Gardner v. Hodgson Brewery Co.* (1), a lost grant is only available where the enjoyment cannot otherwise be reasonably accounted for. On the assumption that the well in 1886 was vested in the landlord, or at least the water-supply enjoyed by defendant's holding, the defendant's claim would be more plausible; but I should find it difficult to establish it. The right put forward is to take water at all times

(1) [1903] A. C., at p. 240.

of the year, and the history of the holdings and the acts of the parties are incompatible with user as of right or make it unlikely. *K. B. Div.*
 The cutting of the holding in two increases the difficulty." *1915.*
W. A.

I think the case resolved itself into a single question of fact which the learned judge decided on evidence, and for the reasons I have given in my opinion the verdict and judgment must stand. *LEONARD.*
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Boyd J. concurred.

C. N. K.

The defendant appealed to the Court of Appeal.

Serjeant Matheson K.C., Serjeant Sullivan K.C., and T. Sullivan,
 for the plaintiff.

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July 8.

H. D. Conner K.C., P. Fleming K.C., and Peart, for the defendant.

Cur. adv. vult.

SIR IGNATIUS J. O'BRIEN C.:—

This case has given me very considerable difficulty, and while in the end I have arrived, with tolerable certainty, at a conclusion different from that of Gibson J., my decision will not be found to be based precisely on the case which was put forward by the appellants here. I may say that I entirely agree with the view of Gibson J., which is consistent with all the authorities on the subject, that he was at liberty to regard all the circumstances of the holdings in question, both at the time of the demise and also with regard to the user since. I do not, however, draw the same inferences from the surrounding circumstances as Gibson J. did in his judgment. If, however, he had taken the same view as I do with regard to that portion of the lease dealing with waters, namely, that it amounted to a reservation of land with water thereon, I think that he would have necessarily regarded the surrounding circumstances from a different point of view, and would have arrived at the same conclusion as I do. I am satisfied that the solution of this case lies altogether in a determination of the question as to

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whether or not this passage in the lease of 1851, on its true construction, operates as a reservation of portion of what otherwise would have been demised. Now, it appears that the well which is the subject-matter of this action consists of a built structure or reservoir into which the waters oozing from the earth first come, and from which they flow by a watercourse. It also appears that this built well must have been of very considerable antiquity. It is situated a very few feet from a boundary; but that boundary at one time, possibly 100 years ago or more, as stated, formed the boundary of what was a county or a public road. The line of the road was altered at some early period that cannot be fixed, and this built structure with waters running into it was not as readily accessible to those having the right to use it, and who were not in occupation of the demised premises, as when it was situated close to the public road. I notice this situation of the well, because the fact that, at first sight, it lies very much within the boundary of the demised premises, was relied upon as one of the physical facts which would go to negative the possibility of any user of the water as of right by persons living on adjoining holdings, or holdings which might possibly be remote from the well, though forming part of the estate of the common landlord. It also appears from the evidence that this well, although the district is somewhat water-soaked, constitutes practically the only available source of pure spring-water for human consumption, and for the production of butter in the dairies in the district. This fact appears to have influenced the mind of Gibson J. in looking at the surrounding circumstances, as strongly negating any supposed right of the defendant, because he said that this was *prima facie* a water-supply on land which it was possible the landlord intended to demise in its entirety, both the farm, speaking generally, and the well used in the sense of water enclosed in a built structure, the structure being situated on a definable point of land; and it was suggested that as these lands were used from the time possibly of the execution of the lease for dairy purposes, the presumption would be that the landlord intended to give the waters absolutely, and the lands from which they issued, to that one tenant. To my mind, however, it would appear a far more probable thing that the landlord would not desire to deprive every

other tenant on his estate of the right to use, at least by licence, these waters which formed practically the only available water-supply in a certain circumscribed district adjoining his demesne. One of the witnesses swore that the absence of the well would materially affect the value of the defendant's holding, on which, although a water-supply might have been made available by the sinking of pumps or shafts, there never had, in fact, been any such mechanical aids used, so far at any rate as drinking-water is concerned.

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It is a matter of common knowledge that the landlord in parcelling out his demesne would much more naturally look to the convenience of his tenants taken as a whole than to the convenience of one particular tenant to whom he does not appear to have been making a letting at a particularly extravagant rate, and who by reason of the demise, as it is claimed here, would be placed in complete control of the only water-supply available for dairying and for human consumption in the whole of that small district then constituting the landlord's demesne. Different people look at matters from different points of view, but to my mind that is a far more striking fact and a far more convincing consideration than that which operated in the mind of Gibson J. with regard to the difficulties which might have been imposed on the original tenant and his assigns if he was not given the sole control of his water-supply. It must also be remembered—and the evidence as to this is not contested—that the water-supply in this well, although not exceptionally large, is plentiful, and ample in the driest season to run a rather largely stocked dairy, and it was mentioned by one of the plaintiff's own witnesses that it was contemplated at one time that a water-supply for drinking purposes for the town of Fermoy should be obtained from that source. The water-supply, then, was plentiful. I now approach the consideration of this lease. In the first place, it is to be observed that at the time of the demise to Reali in 1851, Cornelius Heffernan, a predecessor in title of the defendant, was in occupation of lands adjoining the demised premises, as appears from the boundaries given; the lands are described as bounded on the west "partly by the high road leading from Fermoy to Mitchelstown, and partly by part of the said lands of Ballyclogh in

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possession of Cornelius Heffernan." Now we have in evidence a very remarkable and practically uncontested fact, that at a period within the memory of an old woman named Heffernan, a daughter of Cornelius Heffernan, who was fifty years old at his death, the Heffernans used the water of this well for drinking purposes.

[His Lordship referred to the evidence and continued]—

She was living then in 1864, and we have this striking fact, that from a period fairly close to the date of the lease, apart from any conditions under which the water was taken, the water was taken from that well by the Heffernans. The evidence of the former tenant, who assigned the premises to the defendant in this case, in no way differs from this statement. He says that people used always to go to the well and draw water, and it is clear that in fact the water was taken from the well by the Heffernans and other people from a period shortly after the demise.

Gibson J. states that he could find no case which would exactly solve the legal riddle arising in this demise. Counsel have searched, and I have also searched, but have been unable to find any case which will strictly rule the present one. But, taking into consideration the surrounding circumstances, I find that which is in form described as an exception:—"Excepting and always reserving out of this demise unto the said James Barry, his heirs and assigns, all, and all manner of mines, minerals, coals, quarries of lime and other stone and marble sandpits, and all waters and watercourses in or adjoining said premises . . ."

There is no doubt that every deed must be considered with reference to its own particular language, and although the word "exception" may appear in the document, if on the true construction it is not an exception, it will not be read as such. We were pressed with the argument, which I do not say is not deserving of attention, that the law will not allow of an exception of water *per se*, and it was contended that water merely being, in the language of Coke, of a running nature that cannot be controlled, it follows that water *simpliciter* is not the subject of reservation. If, however, the clear object of the document is to do something,

and if the words are used, as I think clearly and unmistakably they are, with regard to a particular physical subject-matter, the natural thing is to give effect to these words as creating an exception in the manner in which we are entitled to give effect to them under the authorities: namely, as an exception of the well in the sense of the physical structure and the water contained therein, and, taking the surrounding circumstances into account, I am clearly of opinion that this was what was effectuated by the deed. That does not, however, completely solve the question. If there was, in the sense I have described, an exception out of the demise of the well, then it is obvious that that exception enabled the landlord to retain the well and the control over it in his own hands. The well not being demised, the landlord can deal as he pleases with what has been excepted out of the demise; and as the tenant cannot prescribe against his own landlord, so long as the rent is paid and accepted, the lease is operative in favour of the landlord with regard to what has been excepted.

The next line of argument addressed to us was that, even assuming that these words can be read as an exception, there was no right on the part of the landlord to deal with the well for the benefit of anyone except a registered formal assignee of the property which he had retained in it. Notwithstanding the learned argument of Serjeant Matheson on this point, I am unable, on authority and principle, to accede to it. The lease proceeds in these terms:—
 “With full and free liberty of ingress, egress, and regress to and for the said James Barry, his heirs and assigns and his and their servants, labourers, and workmen, with or without horses, carts, or carriages, at any time during this demise, to enter into and upon the said demised premises, and to search for, dig, raise, work, and carry away the same and every part thereof, and to turn and dispose of the said waters and watercourses, and also full, free, unrestricted, undisputed, and undisturbed right and liberty for him the said James Barry, his heirs and assigns, and all and every other person or persons whomsoever, with his or their permission, or by his or their direction or appointment, with or without horses, carts, or carriages, at all times, hours, and seasons during the continuance of this demise, to pass and repass into,

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through, over, and upon the said demised premises, and every part thereof for the purposes aforesaid."

The words could not possibly go further, because they deal not only with the rights of assigns, strictly so called, and their servants, labourers, and workmen, but they give unrestricted liberty for the lessor and his assigns, and all and every other person or persons whomsoever with his or their permission, direction, or appointment, with or without horses, carts, or carriages, to pass and repass into, through, over, and upon the said demised premises and every part thereof for the purposes aforesaid. It would on principle be a somewhat remarkable thing if under a reservation, followed by words of this kind, there would not be power for the lessor, who had not actually assigned the excepted premises, to license his own tenants or other people to enter, and under the terms of the demise itself to take the water in that well. I do not think that either of the cases that were strongly pressed upon us are of direct applicability in the present case. One of them did not deal with an exception at all; the other was one dealing with turbary, and depended upon the particular words of the lease. But *Reynolds v. Moore* (1) has an important bearing on this case, owing to the short passage in which Andrews J. points out the distinction between a reservation and a mere right or profit à prendre. He says at p. 648:—"I come, then, to the real and important question in this case, namely, the nature and extent of the reserved right of sporting. It is, in my opinion, well settled that such a reservation as exists in the present case is neither a servitude annexed to any dominant tenement nor an exception (for it forms no part of the property demised or granted) nor a reservation (for it does not lie in render), but is a profit à prendre, arising from what, although in terms a reservation, is in fact and operation a grant by the lessee, or grantee, to the lessor or grantor of the demised or granted lands."

While it is impossible to find any authority which is directly and conclusively in point, we can obtain assistance from some of the cases; and I think we obtain assistance from the judgment of Byles J. in *Mitcalfe v. Westaway* (2). There a railway company,

(1) [1898] 2 I. R. 641.

(2) 17 C. B. N. S. 658, at p. 667.

being possessed of a shipyard in which was a slip for docking vessels, demised the yard, excepting and reserving out of the demise the slip and the site thereof, and also reserving to the company, their successors and assigns free access to and from the slip. Byles J. there said:—"I think the construction of this section would have been the same if the word 'assigns' had not been found there. All contracts are to be so construed as to give effect to the intention of the parties, even though in some cases this occasions a departure from the strict literal sense of the words used. The slip in question is upon the land demised to the plaintiff; and it is clear that the lessors were in the habit of allowing other persons to use it, and of receiving dues therefor. The demise is of the shipyard, excepting the slip, and reserving to the grantors, 'their successors and assigns, officers, servants, and workmen free access at all times to and from the said slip, for the purpose of using and working or repairing the same or otherwise.' It may be conceded that 'officers, servants, and workmen' exclude licensees; but those words would, I think, be satisfied if the persons using the slip were the officers, servants, and workmen of a licensee. It is plain that if the slip were let by the company for a week, the tenant would be an assign for this purpose, and his servants and workmen would be the servants and workmen of the company and their assigns. If the word 'assigns' had not been there, the other words would imply this; but that word is there. Are we, then, to give 'assigns' the strict literal construction, and hold it to be satisfied only by the grant of such an interest in the slip as would enable the party to maintain trespass? Or are we to construe it so as to comprehend an assignee of the right to use the slip for a valuable consideration, by leave of the company, for a given time? I think the latter is the true construction."

Byles J. thus recognizes in his judgment, and so do the other members of the Court, that where there is a reservation out of the lease, and the words are sufficiently large, and whether assigns are mentioned or not, licensees from the person who has excepted out of the lease certain portions of the premises, may (although an action of trespass might not be maintainable, and the land did not pass to them) have a right against persons to whom the premises are demised to enter on the part excepted and make use of it.

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I am of opinion then, first, that this portion of the premises was excepted, and, secondly, that there was ample power for the landlord to give a licence to anyone he chose, to enter on the excepted portion for the purpose of taking the water out of the well, which was never, in my judgment, demised by the lease to Riali. What, then, was the position of the lessee? He never could have obtained any right by prescription, under the Statute of Limitations or otherwise, against his own landlord; therefore, so long as the lease is a subsisting lease, the landlord is entitled to his rights under the lease, which could never be destroyed by any acts of the lessee, nor could the lessee lawfully prevent any person entering who had received a licence to do so from the landlord.

The construction placed by Gibson J. on the words of this lease, viz., that they did not amount to an exception, would certainly lead to the conclusion that the defendant had not obtained, by lapse of time or otherwise, any rights to the well; but if the latter was never included in the demise, if it was excepted out of the premises demised, and the landlord had the right to permit licensees to enter and draw the water from the well, the evidence in the case, which, on the first construction, would be quite insufficient to establish any right of user, is consistent with the well having been excepted, and the landlord having the right to send in licensees.

In my judgment the locking of the gate against the public is absolutely immaterial. The portion of the land which lay between the well and the old county road, and was within the ambit of the plaintiff's holding, had to be kept preserved from general trespass, and that trespass had to be more carefully guarded against during certain periods of the year than others. If the whole country side, as distinct from licensees of the landlord, were to be at liberty to go in and take the water from the well, there might have been serious risk of shortage. The man was perfectly entitled to prevent the public from entering on his land, and taking the water which was not theirs, so that the locking of the gate, which is the strong point relied on by the plaintiff, to my mind sinks into insignificance when I regard the case as one of a well which was excepted out of the demise to the landlord.

Accordingly, I am of opinion that the right of Reali to use the well had its origin in exactly the same conditions as the right of any other persons whom the landlord might permit to use it, whether such person was the corporate body of the township of Fermoy, if they wanted the water for the purposes of the town, or one of the tenants of his own houses or farms of land who required it. I refer the user by Reali, and unquestionably the user by Heffernan, not to ownership by them but to licence of the landlord. Undoubtedly, there is evidence here of continuous user by the defendant, and the existence of a right such as this, namely, the right to enter by licence, can be presumed from continuous user. I think this Court must presume that the user of the water of the well, and the necessary entry for that purpose, were lawful acts by the defendant arising from the licence of the landlord, given with respect to a subject-matter excepted out of the demise. Once that conclusion is arrived at, the action for trespass must fail, because the entry was referable to a lawful licence by a person having authority to grant it.

The pleadings do not raise this question of entry under licence, and I do not imagine that the result of my judgment will be wholly satisfactory to either plaintiff or defendant; but it certainly has this advantage—that being, as I conceive it to be, well founded in law, there is still an authority who can control the well, and who can enable the waters to be used in a way which will be equitable between the parties here, and prevent this wretched squabble and fighting over what, so far as money is concerned, matters nothing to the plaintiff. The only question remaining is as to the form our order should take. We cannot base it on the theory of an easement granted to the Heffernans in respect of their holding. I decide nothing as to that. I thought at one time that point was capable of being successfully argued, but not now. The declaration will be in substance that there was a licence from the landlord subsisting, and that the judgment of the Court below should be reversed.

RONAN L.J. :—

If this case was before us as judges of first instance, I should have contented myself with concurring in the judgment of the Lord

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Chancellor. However, as we are differing from the view of the judges of the Court below, I think it right, according to the custom of this Court in such cases, to state shortly my reasons in my own language. I shall not, however, repeat his statement of the evidence of the witnesses, as he has anticipated every observation I intended to make. It is plain that the well in question was a most valuable source of water in a dairy district. It was used, at all events, by five families regularly, and by four more during the dry season. The evidence appears to be practically uncontradicted that the well was the only available supply of water suitable for drinking purposes and for making butter on defendant's farm and several adjacent farms.

As to the construction of the lease. "Waters" or "water-courses" is the ordinary conveyancing term: see Conveyancing Act, 1881, sect. 6, sub-s. 1. Waters alone would involve running and stagnant waters. As Lord Halsbury says, speaking of the meaning of "stream" in *M'Nab v. Robertson* (1): "I think that the root idea is water in motion from one place to another as distinguished from stagnant water." What is the legal meaning of "watercourse"? Angel says (6th ed., p. 2), "A water-course consists of bed, banks, and water"; that is—1, the bed; 2, the bank or shore; 3, the water. So that to confine "waters and watercourses" to running water, gives no effect at all to the word "waters." Why "waters" should not include stagnant waters as well as running waters I am at a loss to see, as in such a context it has no effect at all unless it does so. Stagnant water is the subject of property; running water is not the subject of property. A person is only entitled to the flow subject to the same right in others. If we construe "waters" here as meaning running water, we give no effect to the word at all. They are included in "watercourses." Prima facie the words of the deed would include all waters, whether running or stagnant. But we are not here dealing with these terms in the abstract. We are dealing with them in the concrete in a contract between people contracting not with reference to waters and watercourses generally, but with reference to watercourses on a specific piece of land. How are we to approach the question of their meaning in this particular

(1) [1897] A. C. 129, at p 143.

document? I do not of course suggest that a modern document like this can be construed by the user under it. The facts and circumstances I refer to are those that may be reasonably inferred from the evidence as existing at the date of the lease.

In *Shore v. Wilson* (1), at p. 555, a case of the construction of a deed, Parke B. said:—"I apprehend that there are two descriptions of evidence . . . which are clearly admissible in every case for the purpose of enabling a Court to construe any written instrument, and to apply it practically. In the first place, there is no doubt that not only where the language of the instrument is such as the Court does not understand, it is competent to receive evidence of the proper meaning of that language, as when it is written in a foreign tongue; but it is also competent, when technical words or peculiar terms or indeed any expressions are used which at the time the instrument was written had acquired an appropriate meaning, either generally or by local usage, or amongst particular classes."

In *Grant v. Grant* (2) the report states:—"Blackburn J. referred to Blackburn's Contract of Sale, p. 49 (3), where the rule upon this subject is thus stated:—"The general rule seems to be, that all facts are admissible which tend to show the sense the words bear with reference to the surrounding circumstances, of and concerning which the words were used, but that such facts as only tend to show that the writer intended to use words bearing a particular sense are to be rejected." To this, at p. 50, is added the following note—"The principles of the rules of law regulating the admissibility of extrinsic evidence to aid the construction of wills and of contracts required to be in writing, seem to be the same. But, in applying them, it seems necessary to bear in mind that there is a distinction between the two classes of instruments. The will is the language of the testator, soliloquizing, if one may use the phrase; and the Court in construing his language may properly take into account all that he knew at the time, in order to see in what sense the words were used. But the language used in a contract is the language used to *another* in the course of an isolated transaction, and the words must take their meaning from those things of and concerning

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(1) 9 Cl. & F. 355.

(2) L. R. 5 C. P. 727.

(3) 2nd edition.

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which they are used, and those only. This does not affect the law, but it is of some consequence in the application of it, as it narrows the field of inquiry.' No authority is referred to for the proposition; but such was then my opinion, and I still think the same."

Lord Justice James used to say, "In construing a will you are entitled to place yourself in the testator's armchair." Lord Justice Bowen adapted this to the case of contract by saying you are entitled to place yourself (if you can do it) in the chairs of all parties when making the contract. Now, what in this case are the material important facts that were known to these parties which will assist us in ascertaining what they meant? We want to know what the parties to this lease meant by "all waters and watercourses in or adjoining the said premises." We start in my opinion with the ordinary meaning of the words "including all waters and all watercourses." Are there any, and if so what, waters or watercourses on this land? It is plain beyond doubt that the important water on the farm was this well. It was not only the important water on this farm, but it was the important water for drinking and butter-making for several neighbouring farms. They knew that in dairy-land it was the butter that paid the rent; that this well was of vital importance to all the tenants whose principal water-supply it was. The landlord knew that the control of this well was of vital importance to him. The tenant knew this. He also knew that it was the landlord's interest that the other tenants in question as well as he should have the use of this well; that without it they might not be able to earn the rent. Surely in these circumstances it is impossible to believe that these two people when using the word "waters" intended to exclude from its application the one important water on the lands. In my opinion all the facts point to its being the thing above all others intended to be covered by the exception. This is confirmed by the elaborate right of entry reserved, to which I shall refer further on.

The judges of the King's Bench Division did not give any decision on this question of construction, but, as I understand, dealt with the case giving the defendant the benefit of the view I have taken of the exception, but in my opinion they have not

given the proper effect to this view of the exception. Gibson J. does not, as I understand his judgment, say that he would have decided as he has done if he had taken our view on the question of construction. He says that at the trial he was inclined to think that the well did not pass under the lease, that it was covered by the exception. Serjeant Matheson, leading counsel for plaintiff, stated in this Court—"I conducted the case on the assumption that he had no right to the water under the lease." I asked him if he claimed it now by any title other than the lease, and if he asked us to imply a lost grant of the well to the plaintiff. I did not succeed in obtaining an answer.

In my opinion we can presume no subsequent deed granting the right to use the well to the tenant under the lease. It follows that he had no right to take water from the well, save by the permission of the landlord.

This, in my opinion, alters the whole aspect of the case, and the inferences to be derived from the acts of the parties. Were the plaintiff and his predecessors wrongdoers in taking the water from this well during all these years? Every reasonable presumption should be made against such a conclusion. Surely the obvious inference of fact and of law is that the plaintiff used the well by the permission and with the consent of the owner, the landlord. Surely the same inference is to be drawn as to the user by the other tenants on the landlord's estate. It was the interest of both landlord and tenants that they should have the use of this well. He being the owner of the well could regulate the amount each should be allowed to take. I draw the inference of fact necessary to prevent the conduct of all (including the plaintiff and his predecessors) being unlawful, and say that they all took the water by the permission of the landlord.

The real point made for the plaintiff by Serjeant Matheson was this—"I can lawfully go to the well. The others cannot get to the well without trespassing on my land." In order to deal with this, it is necessary to examine carefully the terms of the right of entry reserved by the lease. The lessee had no power to give or refuse permission to take water from the well: it was not his. Serjeant Matheson insisted, however, that he could prevent people going to it through his land. But the

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 1916. regress for the said James Barry, his heirs and assigns, and
WHELAN his and their servants, labourers, and workmen . . . to enter on
v. the said demised premises . . . and to turn and *dispose* of the
LEONARD. said *waters* and watercourses, and also full and free liberty for
Ronan L.J. the said James Barry, his heirs and assigns, *and all and every*
other person whomsoever, with his and their permission, or by his or
their direction and appointment . . . to pass and repass through, over,
and upon the said demised premises, and every part thereof, for the
purposes aforesaid."

In *Mitcalfe v. Westaway* (1), the exception and reservation were
 "to the company, their successors and assigns, officers, servants,
 and workmen free access to and from the said slip." The question
 really was whether under these words the grantors could authorize
 mere licensees who were not their officers, servants, or workmen to
 have access. There were no such words as those italicized above,
 but, at p. 667, Erle C.J., said: "I think the effect of the demise,
 taking it altogether, was, that the slip remained (the fee simple) in
 the grantors, and consequently they were at liberty to make any
 use of it, and to exercise dominion over it, by themselves or by
 their servants, or by assigns *or licensees*, in any way in which
 an owner in fee simple can exercise acts of ownership over his
 property." The words italicized in my opinion put the matter
 beyond doubt in the present case. It necessarily follows that if
 the defendant and his predecessors were not acting unlawfully
 in taking the water, they must have done so by the permission
 of the landlord, and if permitted by him to take the water, surely
 it is a legitimate inference that he authorized them to pass over
 the land, which was the only way in which they could avail
 themselves of his permission. I accordingly draw the inference
 that the defendant was acting lawfully as being authorized and
 permitted by the landlord not only to take water from the well,
 but to pass over the land which he had to traverse in order to get
 to the well for that purpose.

MOLONY L.J. concurred.

Solicitor for plaintiff: *W. J. Magnier.*

Solicitor for defendant: *Richard Rice.*

R. ST. J. C.

R. (MOORE) v. JUSTICES OF COUNTY ANTRIM (1). *K. B. Div.*

1917.

Licensing Acts—Certificate of Justices—Renewal of Licence—Certiorari— Jan. 19, 25.*Householders' Certificate—Necessity for Personal Signature—3 & 4**Wm. 4, c. 68, s. 1; 37 & 38 Vict. c. 69, s. 14.*

The certificate from householders as to the character and conduct of a publican's business required by sect. 1 of the Licensing (Ireland) Act, 1833 (3 & 4 Wm. 4, c. 68), is not an essential preliminary to the jurisdiction exercised by the justices under sect. 14 of the Licensing (Ireland) Act, 1874 (37 & 38 Vict. c. 69), in granting a certificate for the renewal of a licence.

Hence, certiorari does not lie to quash the order and adjudication of the justices acting under sect. 14 of the Licensing (Ireland) Act, 1874, or the certificate granted by them for the renewal of the licence, merely because the certificate from the householders is informal or invalid.

Semble: The certificate required by sect. 1 of the Licensing (Ireland) Act, 1833, must be personally signed by the six householders.

CERTIORARI.

Application to make absolute a conditional order for certiorari to quash all orders and adjudications of the justices of the peace in and for the County of Antrim, made at the annual licensing petty sessions held at Carrickfergus on the 19th September, 1916, granting the application of William Sloan for the certificate in that behalf required to enable him to obtain a renewal of a publican's licence in respect of premises situate at North East Division, Carrickfergus, and also the said certificate.

The following grounds were set out in the conditional order:—1. That said order of renewal was made without jurisdiction. 2. That said order of renewal was made in excess of jurisdiction. 3. That the householders' certificate necessary for the renewal of said licence was not signed by six householders in pursuance of the statute. 4. That no certificate under the statute existed or was produced certifying to the good character of the applicant, and to the peaceable and orderly manner in which his publichouse was conducted during the preceding year. 5. That the householders' certificate produced in alleged compliance with

(1) Before GIBSON, KENNY, and GORDON JJ.

K. B. Div. the statute was as to the names of the householders signed
 1917. thereon a forgery.

R. (MOORE) It appeared from the affidavits that William Sloan was licensed
v. in his own name in respect of a publichouse owned, kept, and
JUSTICES OF managed by him at North East Division, Carrickfergus. There
Co. ANTRIM. was no objection to the way in which the licensed premises had
 been conducted. At the annual licensing petty sessions held at
 Carrickfergus on the 19th September, 1916, William Sloan
 applied for the justices' certificate enabling him to obtain a
 renewal of his licence from the excise authorities in the ordinary
 way. For the purpose of his obtaining this certificate from the
 justices he produced a certificate purporting to be that required
 by sect. 1 of 3 & 4 Wm. 4, c. 68, that is to say, a certificate signed
 by six householders of the parish (two of them being residents of
 the townland in which such house is situated) to the good
 character of the applicant. In pursuance of this certificate from
 the householders, William Sloan obtained the certificate from the
 magistrates (under sect. 11 of the 17 & 18 Vict. c. 89, s. 16 of the
 37 & 38 Vict. c. 69, s. 49 of 35 & 36 Vict. c. 94, and s. 2 of
 37 & 38 Vict. c. 69) necessary to enable him to obtain a
 renewal of his licence. The signatures to the householders'
 certificate were not the personal signatures of the householders,
 but were all in the handwriting of William Sloan, who had
 signed the names, in each case upon receiving authority to do so
 from the person whose name was signed, but had not signed them
 in the presence of such person. In one case the authority was a
 general authority to sign given some years previously.

The following was the form of the householders' certificate as
 required by 3 & 4 Wm. 4, c. 68, s. 1:—"We, the undersigned,
 being six householders in the parish of St. Nicholas, in the North
 East Division in the County of Antrim, two of us, namely, James
 Hayburn and John M'Auley, being residents of the said town-
 land in which the house of William Sloan is situate, do hereby
 certify that the said William Sloan, who keeps a publichouse at
 North East Division, Carrickfergus, in the said parish, townland,
 and county, is of good character, and that he has conducted his
 house in a peaceable and orderly manner during the past year.
 Dated this 16th September, 1916."

Serjeant Matheson, Cusack, and Devitt, for the prosecutor:— *K. B. Div.*

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The grant of the renewal of the licence is governed by sect. 1 of the Licensing (Ireland) Act, 1833 (3 & 4 Wm. 4, c. 68), and s. 11 of the Spirits (Ireland) Act, 1854 (7 & 8 Vict. c. 89). The former section requires a certificate, signed by six householders of the parish (two of them being residents of the next adjoining townland or street . . . in which such house is situate). In the present case, the names were not signed personally. They were all in the same handwriting. Personal signature is necessary. The cases where it was held that a name need not be signed personally were cases of notices, e.g. *R. v. Kent Justices* (1). In *Toms v. Cuming* (2), it was held that the objection to a voter must be signed by the objector. The written acknowledgment required by the 9 Geo. 4, c. 14, to take a case out of the Statute of Limitations, must be signed personally: *Hyde v. Johnson* (3). They also referred to *Brown v. Kinsella* (4); *In re Whitely, Partners, Limited* (5); *R. (Murphy) v. Donegal Justices* (6); *Mountcashel v. O'Neill* (7).

W. Moore K.C. and *T. W. Brown*, for the applicant for the renewal of the licence:—

There is nothing to make a personal signature necessary. Under sect. 14 of the Licensing Act, 1874, once the application is sent in, he need not even attend the Court. A signature may be by means of an agent: *R. v. Kent Justices* (1). *In re Whitely, Partners, Limited* (5) decides that an attorney can sign, where a parol authority is sufficient, without stating that he is an attorney. Signature by an agent was held sufficient in *Lessee of the Commissioners of Wide Streets v. —* [sic] (8), and *Brown v. Kinsella* (4). There was no attempt at forgery, for the signatures are evidently in the same handwriting. The police should have objected at petty sessions. They stood by and allowed the magistrates to grant the certificate. Certiorari will not be granted in such circumstances: *O'Connor's Justice of the Peace*, Pt. I, p. 304:

(1) L. R. 8 Q. B. 305.

(2) 7 M. & G. 88.

(3) 3 Scott, 289.

(4) 24 L. R. Ir. 99.

(5) 32 Ch. D. 337.

(6) 30 I. L. T. R. 6.

(7) 5 H. L. C. 937.

(8) 3 Law Recorder (O. S.), 63.

K. B. Div. *R. v. Williams* (1); *R. v. Byles* (2). The householders' certificate, 1917. though essential to the grant by the Excise, is not a condition precedent to the exercise by the justices of their jurisdiction under sect. 14. If the Excise authorities grant the licence, the JUSTICES OF *R. (MOORE) v. Co. ANTRIM.* licence cannot be quashed on certiorari: *R. (Gilbey) v. Fermanagh Justices* (3); *R. v. Overseers of Salford* (4).

Cur. adv. vult.

The judgment of the Court was delivered by Gibson J.

Jan. 27.

GIBSON J.:—

This application to quash on certiorari an unopposed order of justices, dated 19th September, 1916, for the purpose of renewal of Sloan's licence made under sect. 14 of the Licensing Act, 1874, was based on non-compliance with sect. 1 of 3 & 4 Wm. 4, c. 68, which directs an Excise licence to be issued by way of renewal on the production of a certificate signed by six householders of the parish (two of whom were to be residents in the townland or street where the licensed house was situate). The signatures to the certificate, which was as to the character of Sloan and as to the conduct of the business in the premises, were written by Sloan himself, and forming originally part of the application before the justices, purported to represent the authentic sign manual of the apparent signatories. The affidavits disclose a dangerous practice that appears to have sprung up. It is stated that the householders, although able to write, authorized Sloan to sign in their names, though when questioned by the police they at first denied having given such authority. In the case of one, the alleged authority was given to Sloan's niece, and in the case of another, M'Camley, this authority was seemingly of a general prospective character, and not for the purpose of the particular renewal of September, 1916. On the face of the certificate produced before the justices and the Excise there was nothing to indicate that the names were not autograph. Having regard to Sloan's good character, the absence of any attempt to disguise the writing, and his belief that the course taken was authorized and legitimate, he must be acquitted of the charge of forgery. The

(1) [1914] 1 K. B. 608.

(2) 77 J. P. 40.

(3) [1897] 2 I. R. 559.

(4) 18 Q. B. 687.

case was argued by Serjeant Matheson on the basis that, though authority may have been given, the householders must sign in person, and at least that if the signatures could be by proxy, the fact should distinctly appear on the document, particularly where the publican, whose character was to be attested, was the person signing. He contended with much force that under the Act of 1833 the only safeguard was the certificate signed by persons in the locality whose personal execution could be obtained without difficulty; that the Excise had at once to act on the certificate produced, and had no machinery or means of ascertaining whether a signature, if not autograph, was authorized; that the then present character was what was to be vouched, and a delegation beforehand, perhaps long before made, would deprive the certificate of value; that the publican should himself sign as to his own character was preposterous. He referred to authorities such as *Toms v. Cuming* (1) and other cases which will be found in Stroud's Judicial Dictionary under "Signed" in support of his construction. Mr. Moore, on behalf of Sloan, relied on cases establishing that under certain statutes execution in the principal's name by an agent was sufficient.

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The point depends on the object and context of the particular legislation. If it were necessary to decide the question now, we would perhaps find it difficult not to accept Serjeant Matheson's interpretation of sect. 1. When, however, the arguments had nearly closed, it appeared to the Court that the certificate was a matter only affecting the Excise, and not one affecting the jurisdiction, to be considered under sect. 14 of the Act of 1874, and the case was then argued as to that point.

Sect. 1 of the statute of 1833 replaced the previous justices' certificate under 6 Geo. 4, c. 81, sect. 13, and was the only condition or safeguard attached to the issue of a licence. To the householders' certificate there was subsequently added another certificate under 6 & 7 Wm. 4, c. 38. The Act of 1854, sect. 11, restored the justices' certificate (as to which see *Lambe's Case* (2) and *Reg. v. Co. Antrim Justices* (3)), which could not be refused without grounds: 18 & 19 Vict. c. 62, sect. 1. The certificate of licences henceforward remained the

(1) 7 M. & G. 88. (2) [1897] 2 I. R., at p. 74. (3) [1901] 2 I. R., at p. 152.

K. B. Div. 1917. main effective protection and condition, e.g. 27 & 28 Vict. c. 35, sects. 3 and 4. The situation is now governed by the Act of 1874, sect. 14. The certificate, however, of householders, still survives as a requisite, though the English statute, 4 & 5 Wm. 4, c. 85, sect. 2, containing an analogous provision, was repealed in 1869. It might appear that the certificate of justices as to character and conduct should be sufficient, but renewal remains subject to the two conditions, production of the householders' certificate and the certificate of justices. The duty of justices is prescribed by sect. 14; though the householders' certificate may be annually before them, it is not a condition to their jurisdiction; the Act of 1833 does not define the time when it is to be produced to the Excise; the justices have not any function to perform as to such certificates. They adjudicate as a court on objection on sworn testimony as to character and conduct of the business. The certificate of the local householders is an independent safeguard, and rests with their uncontrolled discretion. The absence or invalidity of such certificate cannot affect the justices in the performance of their prescribed duty founded on the decision of objections: *R. (Perry) v. Tyrone Justices* (1) (noted in O'Connor's Licensing Laws, 565 at p. 575); *Dakin v. Parker* (2). The Excise function created by sect. 1 of the Act of 1833 is quite different and distinct: *Reg. v. Fermanagh Justices* (3), approved of by Holmes L.J. in *Reg. v. Co. Antrim Justices* (4).

It is quite impossible to treat the certificate under sect. 1 of the Act of 1833 as an essential preliminary to the jurisdiction exercised under sect. 14 of the Act of 1874, and occupying the same position as the notice dealt with in *R. (Byrne) v. Justices of Dublin* (5).

The conditional order must, therefore, be discharged. It was not disputed that sect. 1 as to this certificate (though that section is affirmatively worded like the section before the Court in *R. (Byrne) v. Justices of Dublin* (5)) was mandatory and not directory. Whether the effect of non-compliance with the statutory condition may not make the licence void (as in *Thompson v. Harvey* (6)),

(1) (Unreported.)

(2) [1894] 2 Q. B. 556.

(3) [1897] 2 I. R. 559.

(4) [1901] 2 I. R., at p. 182.

(5) [1904] 2 I. R. 190.

(6) 4 H. & N. 254.

or whether some other method of dealing with violation of this statute may not be available, is a matter which must be left to the Excise authorities. We do not discuss or determine this, or whether the certificate is invalidated by the method of signature adopted. The licence issued by the Excise if invalid is not subject to our control by certiorari, as it is not, like the justices' certificate or order, a judicial act, though mandamus would lie if it was wrongfully refused: *Reg. v. M'Carthy* (1). Had the Excise officer been aware that the certificate produced by Sloan was not, in fact, signed by the six householders, and refused to issue a licence on that ground, the present controversy could have been decided on mandamus. It is to be hoped that the present discussion will put an end to the mischievous practice, if it exists, of a publican subscribing names to the certificate of character which may deceive the Excise, and might, if the licence was rendered void, expose the publican to possible prosecution and inability to renew.

Solicitor for the prosecutor: *The Chief Crown Solicitor.*

Solicitor for the applicant for renewal of the licence: *Robert J. Porter.*

A. E. C.

(1) 22 L. R. Ir. 18.

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Nov. 10, 17.

IN THE MATTER OF O'B., AN ARRANGING DEBTOR.

*Liquidated Damages—Agreed Sum payable on Breach of Agreement—
Proof of Debt—Costs.*

A company who were patentees of a mechanical apparatus for cash despatch in shops, sought to prove against the debtor for a sum of £30, and to remove their installation from the debtor's shop, relying upon an agreement whereby in effect, in consideration of the use of the apparatus, and of the installation, repair, and final removal of the same by the Company, the debtor agreed to keep the apparatus for seven years certain, and to pay therefor a sum of £35 in annual instalments of £5, of which one instalment only had been paid prior to her arrangement.

Held, that the sum payable upon breach of the agreement was liquidated damages and not a penalty, and that the proof should be allowed but without costs.

The question of allowing costs of proof is in all cases a matter for the discretion of the judge.

APPLICATION on behalf of a company called the Lamson Store Service Company (Limited), patentees of an installation called the Lamson Rapid Wire System, a mechanical apparatus for cash despatch in shops, that they might be permitted to prove for a sum of £30, and also that they might be at liberty to remove the installation from the shop of the arranging debtor. On May 15th, 1915, the company undertook with the arranging debtor to instal in her shop their wire system, and an agreement was entered into with her. By the first clause of the agreement the apparatus was demised and leased to the arranging debtor (therein called "the lessee") "to be used only in the lessee's premises at C. for the term of seven years from the date of completion of the said system on the said premises, and thereafter until the lessee shall give the lessors two calendar months' notice in writing before the expiration of any current year determining this lease; provided that the lessors hereby reserve the right to determine this lease at any time after the said term of seven years upon giving two calendar months' notice in writing to the lessee." This clause bound the lessee to keep the installation in her shop for a term of seven years. By the second clause the annual rent was fixed at

fifty shillings for three stations or more. There were two installations of three stations, for which the rent was, therefore, £5 per annum, and this rent was payable by the lessee for seven years certain; in other words, the lessee bound herself to pay the sum of £35 by instalments of £5 per annum. Nothing was to be charged by the company either for the installation or for the removal of the system. The annual rent covered not only the costs of installation and removal, but also, under clause 3, the cost of any necessary repair. Clause 5 provided that the lessee should pay to the company the annual rental in advance during the continuance of the lease, and should not, without the consent of the company, discontinue the use of the system; nor use it elsewhere than on the premises as erected; nor detach nor remove nor part with the possession of the system, nor make unreasonable or improper use of it; and should allow the company and their agents, at reasonable times, to enter on the premises where the system was and examine the condition of it, and make necessary repairs; and should at the expiration of the lease deliver up the system to the company in as good order and condition as when accepted by her (reasonable use and wear thereof only excepted).

The last clause was as follows:—"Provided always that the said system and every part of it shall be or remain the sole and exclusive property of the lessors, and this agreement is upon the condition that in case of breach of any of the conditions or agreements to be observed or performed on the part of the lessee, or in case the said system shall be taken from the lessors or attached by process of law, by proceedings in bankruptcy, insolvency, or otherwise, or in case the said lessee shall file a petition for arrangement in the King's Bench Division in Bankruptcy of the High Court of Justice in Ireland, the whole of the rent for the remainder of the term shall immediately become due, and the lessors may forthwith, without notice or demand, enter upon the said premises where the said system may be and take possession of the said system and remove the same forcibly, if necessary, without let or hindrance from the lessee, or any person claiming through or under the lessee, and without prejudice to the lessors' right to recover the rent."

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1916.

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Oulton K.C., for the applicants, referred to *M'Entire v. Crossley* (1); *Wallingford v. Mutual Society* (2); *Ex parte Cochrane* (3); *Protector Endowment Loan Co. v. Grice* (4), and, on the question of allowing the applicants their costs of proof, cited *National Wholemeal Bread and Biscuit Co.* (5).

J. H. S. Russell, for the arranging debtor, relied upon *In re Newman*, *Ex parte Capper* (6); *Astley v. Weldon* (7).

His Lordship, having stated the facts and the terms of the agreement, as above set out, proceeded as follows:—

Clause 5 had two objects. In the first place, an installation of the kind is, in itself, an advertisement for the patentee, and the price payable by the lessee is, presumably, partly based on the value of such advertisement; in the second place, any neglect of, or tampering with, the installation would injure the system, which was at all times to remain the property of the company.

The effect of the whole of this document may be put shortly as follows:—"In consideration of the use of the company's apparatus, and of the installation, repair, and final removal of the same by the company, the lessee agrees to keep the apparatus for seven years certain, and to pay therefor a sum of £35 in annual instalments of £5."

The essential thing in this agreement is that the sum of £35 must, in any event, be paid. The mode of payment is merely a matter of convenience, and it depends wholly on the lessee whether that mode of payment is to continue to the end of the term of seven years or not. If she should commit any breach of the agreement, or do anything which might imperil the company's property, or the consideration to be paid, then the whole of the balance of the sum of £35 then unpaid immediately became due and payable, and the company might, if they should think it wise, at once remove the apparatus. Such a bargain may, perhaps, be thought hard, but it is certainly not unreasonable, nor one which, if it appears to be the true bargain entered

(1) [1895] A. C. 457.

(2) 5 A. C. 685.

(3) 26 W. R. 818.

(4) 5 Q. B. D. 121, 592.

(5) [1892] 2 Ch. 457.

(6) 4 Ch. D. 724.

(7) 2 B. & P. [1800] 346.

into between the parties, the Court will refuse to uphold. I have come to the conclusion that this was the bargain between the company and the arranging debtor, and that it ought to be upheld.

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Mr. Oulton has, amongst other cases, referred me to the case of *The Protector Endowment Loan Company v. Grice* (1). In that case a sum of money, which covered not alone the principal of a loan, but also interest, expenses of negotiation, and premiums on an insurance on the debtor's life, was payable by instalments running over a period of five years; but, by a condition of the bond, the whole sum then unpaid became due and payable on the failure to pay any instalment. Mr. Justice Bowen, as judge of first instance, applying, as he considered, the equitable doctrine as to penalties and liquidated damages, held that the sum claimed could not be recovered. The plaintiffs appealed, and the appeal was heard by a Court consisting of Cockburn C.J., Baggally, Bramwell, and Brett L.JJ., and they unanimously reversed Bowen J. The reason for their so doing was shortly summed up by Bramwell L.J. He said:—"Apart from the authorities which bind us, I do not quite assent to the principle upon which this doctrine is founded. A definition of the principle may possibly be that when a sum is payable as a punishment for a default, or by way of security, and the realization of that sum is not within the original intention of the parties, the sum is a penalty; but when it forms part of the original intention that, upon default, a sum, otherwise payable at a future period, shall become forthwith payable, it is no longer a penalty." Apply that definition to the facts of this case. The sum of £30 now claimed is a sum "otherwise payable at a future period." Does it form part of the original intention of the parties to the bargain that it should be payable forthwith upon default? There can be no doubt that such was the original intention. Can it be suggested that, notwithstanding the intention, it was payable as a punishment, or by way of security? I think not. It amounted to no more than the sum which, in any event, must be paid. Bramwell L.J. adds:—"I do not know whether this definition is correct. I admit that 'it is something vague'; but it is the best definition

(1) 5 Q. B. D. 121, 592.

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which, at the present moment, presents itself to me." That definition, at any rate, is quite sufficient for my decision. It suits the circumstances of the present case exactly, and I, therefore, hold that the sum of £30 claimed under the agreement is to be regarded, not as a penalty, but as a sum agreed upon between the parties, which became payable upon breach of the agreement.

In re Newman, Ex parte Capper (1), was cited by Mr. Russell, not because the case itself has any resemblance to this case, but because James L. J. quoted with approval a statement by Mr. Justice Heath made in *Astley v. Weldon* (2). The statement is as follows:—"Where articles contain covenants for the performance of several things, and then one large sum is stated at the end to be paid upon breach of performance, that must be considered a penalty; but where it is agreed that if a party do a particular thing such a sum shall be paid to him, there the sum stated may be treated as liquidated damages." Mr. Russell asked me to hold in this case that, as there were a number of events, on the happening of any one of which the company could claim payment of the balance of £35 then due, such balance must be regarded as a penalty. Now, upon reading *Newman's Case* (1) and the cases referred to therein, it will appear clear that Mr. Justice Heath's definition is incomplete and misleading. In *Magee v. Lavell* (3) Lord Coleridge says:—"If we look to the nature of the contract in the present case, it will be seen that it involves several events of varying degrees of importance, and therefore, according to the general principle governing such cases, the sum mentioned must be regarded as a penalty and not as liquidated damages." These words, which are quoted with approval by Bramwell L.J. in *Newman's Case* (1), supply what is missing in Mr. Justice Heath's definition. It is not the existence of covenants for the performance of several things which governs the doctrine, but the existence of covenants for the performance of several things of varying degrees of importance. Lord Eldon's judgment in *Astley v. Weldon* (2) gives as clear a proof of the necessity of enlarging the definition as could be required. Here are his words: "There are many instances of the defendant's misconduct which are made the subject of specific fines by the laws of the theatre.

(1) 4 Ch. D. 724. (2) 2 B. & P. 346, 353. (3) L. R. 9 C. P. 107, 115.

Are we, then, to hold that if the defendant happens to offend in a case which has been so provided for by these laws, she shall pay 2s. 6d. or 5s.; but if she offend in a case which has not been so provided for, she shall pay £200?"

In my opinion, the doctrine laid down in *Newman's Case* (1) has no application at all to the present case. What the Court held in that case was that the sum payable was a punishment for default. In this case I am clear that it is not a punishment. However, admitting for the purpose of Mr. Russell's argument that the doctrine does apply, are the covenants contained in the agreement covenants for the performance of several things of varying degrees of importance? I think not. The breach of any one of the covenants puts in jeopardy the installation itself and the proper working of the patent. I may add that, even if the sum to be paid were to be regarded as a punishment, I am of opinion that it could not be called unreasonable.

I hold that the company are entitled to prove for the amount claimed, and are also entitled to remove their installation from the premises.

Oulton K.C. applied for costs, and referred to *Re National Wholemeal Bread and Biscuit Company* (2).

PIM J. :—

Counsel for the applicant has asked me to give him the costs of the application on the ground that the question for determination necessitated a legal argument of some importance. It was intimated to me that it was the invariable practice of the Court in all cases arising on proof of debts to refuse the costs of such proof, and I was referred to Order 88, Rule 143, which is as follows:—"A creditor shall bear the cost of making proof of his debt, unless the Court or the Chief Registrar shall otherwise order." If such was the practice of the Court, it was, in my opinion, quite wrong. The Judge has a discretion in all these cases which he should exercise; and I intend to exercise my discretion as to costs in all cases, whether they come by way of appeal from the Registrar's decision, or whether they are put into

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(1) 4 Ch. D. 724.

(2) [1892] 2 Ch. 457.

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the list by the Registrar, on account of some difficulty which may be involved in them, without a hearing before him.

I do not think that the mere existence of a question of law in a case is a sufficient justification for giving costs to a successful creditor. In this case the difficulty which arose was largely due to the applicant creditors themselves, as it was concerned with the interpretation of a document which they prepared, and to which they obtained the signature of the arranging debtor. This is not a case, therefore, in which I should give the creditor the costs of his application, and I cannot do so.

Solicitors for the applicants: *Franks & Oulton.*

Solicitor for the arranging debtor: *W. V. Seddall.*

T. H. M.

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1917.
April 20.

SHORE, APPELLANT; CUNNINGHAM AND OTHERS,
RESPONDENTS (1).

Justices—Jurisdiction—Petty Sessions—Power to estreat a Recognizance to be of Good Behaviour—Conflict between enacting part of a Statute and Schedule thereto—Petty Sessions (Ireland) Act, 1851 (14 & 15 Vict. c. 93), ss. 34, 36, Schedule, Form (C).

Justices at Petty Sessions have no jurisdiction to estreat a recognizance to be of good behaviour.

It is a cardinal principle of construction, that where there is a conflict between the forms given in a schedule to a statute and the enacting part of the statute, the forms must give way to the enacting part.

CASE STATED by justices pursuant to the Summary Jurisdiction Act, 1857 (20 & 21 Vict. c. 43).

At a Petty Sessions held at Westport on the 1st of March, 1917, the complainant, District Inspector Shore, R.I.C., applied to the magistrates sitting in Petty Sessions, to estreat a recognizance entered into by the defendant, John Cunningham, farmer, and his two sureties, John J. O'Malley, shopkeeper, and John O'Malley, farmer, on the 10th of August, 1916.

(1) Before SIR JAMES H. CAMPBELL, Bart., C.J., and MADDEN and GORDON JJ.

The facts proved or admitted at the hearing were stated in the case as follows:—

"1. On that date, the 10th of August, 1916, the said John Cunningham was charged at said Westport Petty Sessions with having threatened to shoot a man named John Malone, and with using other threats towards him; and the said defendant Cunningham was ordered by the Court to find sureties to keep the peace and be of good behaviour for twelve calendar months.

"2. On the same date, namely, the 10th of August, 1916, the said defendant Cunningham duly entered into a recognizance with two sureties as ordered by the Court."

[A copy of the recognizance, which was in Form C to the Petty Sessions (Ireland) Act, 1851, was attached to the case stated; and the obligation therein was "to keep the peace and be of good behaviour towards His Majesty King George 5 and all His Majesty's liege subjects, and particularly towards John Malone, of Touranny, in the said county of Mayo, farmer, for the period of twelve calendar months from the date of this recognizance."]

"3. On the 8th of February, 1917, the said defendant Cunningham was charged at Westport Petty Sessions with having been found drunk and incapable on the public street at Westport on the 1st of January, 1917. He was convicted, and fined £2, or, in default of payment, to be imprisoned for one month, he having been twice previously convicted of drunkenness within the previous twelve months.

"4. The defendant having been convicted of drunkenness, District Inspector Shore then and there applied to the magistrates to certify on the recognizance that the defendant Cunningham had not performed the obligations thereof, inasmuch as the conviction for being drunk and incapable on the public street was a breach of his recognizance to be of good behaviour. The magistrates adjourned the application for a week to next Petty Sessions day: and on that day, the 15th of February, 1917, the Resident Magistrate (presiding) stated that the magistrates were of opinion that the recognizance had become forfeited owing to the defendant's conviction for being drunk and incapable, and he then certified that the recognizance had not been complied with.

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"5. Notices were subsequently served on the defendant Cunningham and his sureties by District Inspector Shore, that he would apply to the magistrates at Petty Sessions on the 1st of March, 1917, to estreat the said recognizance on the ground that Cunningham having been convicted of being drunk and incapable, had thereby forfeited his recognizance.

"6. On the hearing of the application at petty sessions on the 1st of March, 1917, it was contended by the solicitor on behalf of the defendant :—

"1. That the offence of being drunk and incapable is not a breach of the terms of a recognizance to keep the peace. This was admitted by the appellant.

"2. That a Petty Sessions Court has no jurisdiction to estreat a recognizance to be of good behaviour if any of its terms are broken, as such recognizances can only be estreated by the King's Bench Division.

"3. That the offence of being drunk and incapable on the public street is not a breach of the terms of a recognizance to be of good behaviour.

"The magistrates were unanimously of opinion :—

"1st. That they had no jurisdiction to estreat a recognizance to be of good behaviour if it became forfeited; that there was no statutory provision empowering magistrates to estreat such a recognizance; that magistrates were empowered by the Petty Sessions (Ireland) Act, 1851 (14 & 15 Vict. c. 93), sect. 34, to estreat a recognizance to keep the peace only. They, therefore, refused the application to estreat in this case.

"2nd. And further that the offence of being drunk and incapable on the public street is a breach of the terms of a recognizance to be of good behaviour, but not a breach of the terms of a recognizance to keep the peace."

The opinion of the Court was sought as to whether they were right in law on each point.

Devitt and Serjeant McSweeney K.C., for the appellant :—

Apart from statute, justices of the peace, like their predecessors the old conservators of the peace, always had under their commission jurisdiction to bind persons to the peace or to be of good

behaviour. Recognizances are a creation of statute, and at common law no particular form of recognizance was necessary. But the power to estreat recognizances was for the first time conferred upon justices of the peace by sect. 34 of the Petty Sessions (Ireland) Act, 1851. Prior to that Act the Assistant Barrister had under sect. 18 of 1 & 2 Vict. c. 99, power to estreat recognizances to keep the peace. That power was by the Petty Sessions (Ireland) Act, 1851, transferred to the justices at petty sessions. Section 34 of the Petty Sessions (Ireland) Act, 1851, provides that "whenever any person shall be bound to appear, or to keep the peace, it shall be done by a separate recognizance (C)." Sect. 36 provides that "in all proceedings under this Act the several forms in the schedule to this Act contained, or forms to the like effect, shall be deemed good, valid, and sufficient in law, and shall be the proper forms to be used . . ." Sect. 34 only mentions a recognizance to keep the peace; but when Form C, given in the schedule to the Act, is looked at, it interprets what the section means. The form contains the words "to keep the peace and be of good behaviour," thereby showing that the words of the section "to keep the peace" include the words "to be of good behaviour." There is no essential difference between "keeping the peace" and "being of good behaviour"; they involve the same elements. Rule 246 of the English Crown Office Rules, 1906, only mentions "articles of the peace," but Form No. 198 in App. C to those rules is headed "Recognizance for Good Behaviour and to Keep the Peace," and the condition of recognizance given in the form is "if the said — shall be of good behaviour . . . and keep the peace." If a recognizance to be of good behaviour can only be estreated in the High Court, the procedure for estreating such a recognizance must always be very complicated; it will be necessary to bring up the recognizance by certiorari, and then direct an issue to be tried by a jury. Hayes J., in his book on Criminal Statute Law, 2nd ed., vol. ii, p. 842, says that "a recognizance for the good behaviour shall be forfeited for all such matters as would cause a forfeiture of recognizance for the peace; and others besides, as for going armed with great numbers to the terror of the people, or speaking words tending to sedition, &c." He goes on to say that when the recognizance has

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As to the conflict between sect. 34 of the Act and Form (C) in the schedule, Brett L.J. said in *Attorney-General v. Lamplough* (3), at p. 229:—"A schedule in an Act of Parliament is a mere question of drafting—a mere question of words. The schedule is as much a part of the statute and is as much an enactment as any other part." In *Dean v. Green* (4) Lord Penzance said, at p. 89:—"It would be quite contrary to the recognized principles upon which courts of law construe Acts of Parliament to enlarge the conditions of the enactment, and thereby restrain its operation, by any reference to the words of a mere form, given for convenience sake in a schedule, and still more so, when that restricted operation is not favourable to the liberty of the subject, but the reverse." It is needless to cite authorities for these principles of construction, but it so happened that there is in existence a most apposite one by a Justice of high repute (Lord Cottenham) in relation to the schedules of this very statute. In *Re Baines* (5) he said, speaking of this very schedule:—"If the enacting part and the schedule cannot be made to correspond, the latter must yield to the former."

There was no appearance on behalf of the respondents.

SIR JAMES H. CAMPBELL C.J.:—

At first when this case was opened to us we thought that it would be necessary to reserve judgment for a more careful consideration. But we have had the advantage of a very full and impartial statement by Counsel for the Crown, and in the

(1) 10 L. R. Ir. 294.

(4) 8 P. D. 79.

(2) [1901] 2 I. R. 595.

(5) [1840] Cr. & Ph. 31.

(3) 3 Ex. D. 214.

result we are satisfied as to what our conclusion ought to be. The question in the case turns on whether under the Petty Sessions (Ireland) Act, 1851, jurisdiction exists in magistrates to estreat recognizances to be of good behaviour. The jurisdiction to compel persons to enter into these recognizances, whether to keep the peace, or to be of good behaviour, or both, attached to justices long before the Act of 1851 and was inherent under their commission. But by this Act justices for the first time got power to estreat recognizances to keep the peace. Sect. 34 of the Act says that whenever any person shall be bound to appear, or to keep the peace, it shall be done by a separate recognizance in Form C in the schedule to the Act, or by a form to the like effect. The draftsman of the Act seems to have thought that Form C was available whether the person was bound to keep the peace or to keep the peace and be of good behaviour. What we are asked to say is this, namely, that the fact that the Petty Sessions (Ireland) Act, 1851, refers to a form which contains the words "to keep the peace and be of good behaviour" in a conjunctive form, while the section only contains the words "to keep the peace," would entitle us to hold that by sect. 34 the Legislature intended to confer on the justices the power to estreat a recognizance to be of good behaviour. It would be convenient if we could see our way to come to that conclusion, because the usual procedure for estreating recognizances is very complicated. But to do so we would have to hold that while sect. 34 is precise and clear, the effect of the form in the schedule is to extend the words in the section "to keep the peace" to a much wider and more important subject-matter, for it is certain that recognizances to be of good behaviour have been extended to many cases not included in the keeping of the peace. In *Dean v. Green* (1) it was accepted as a cardinal principle of construction that where there is a conflict between the forms given in a schedule to a statute and the enacting part of the statute the forms must give way to the enacting part. That seems to me to be good sense, and it gets rid of the question in this case. We therefore think that we cannot interfere with the decision of the justices.

It may be that the omission from the section of the power to estreat recognizances to be of good behaviour has occurred per

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K. B. Div. incuriam, and should be amended by legislation, but, as my brother
 1917. Madden has said, the decision on whether or not in any particular
 SHORE case there has been a breach of a recognizance to be of good
 v. behaviour may involve questions of difficulty, and the Legislature
 CUNNING- may for this reason have deliberately refrained from conferring
 HAM. jurisdiction in this respect upon the justices.
 Sir J. H. Campbell C.J.

By sect. 18 of 1 & 2 Vict. c. 99, the assistant barrister formerly had jurisdiction to deal with recognizances in the case of sureties for the peace, but not for good behaviour, and this is a strong argument in favour of the contention that when the power to estreat recognizances was transferred to the justices the power intended to be conferred upon them was only the power to estreat recognizances to keep the peace. We answer the first question only. It is unnecessary for us to answer question 2, having regard to the admissions of the appellant, and to our answer to the first question.

MADDEN J. concurred.

GORDON J. :—

I agree in the result arrived at by the Lord Chief Justice. It seems to me that however convenient it might be that justices should be able to estreat recognizances to be of good behaviour, we cannot decide that they have power to do so. Prior to the Act of 1851 justices had power to require persons to enter into recognizances either to keep the peace or to be of good behaviour or both, and, therefore, that Act was not required for the purpose of conferring that power upon them, and was only required for the purpose of giving them power to estreat recognizances. Section 34 itself limits that power to recognizances to keep the peace, and the schedule to the Act gives a form which enables the magistrates to use the power thereby conferred on them, but it does not go beyond that. We should be legislating if we were to hold that the schedule extends the power of estreating recognizances given by section 34, and it is not necessary in order to give effect to the section that this extension should be made. Full effect can be given to it by merely using in the schedule the language contained in the section.

Solicitor for the appellant : *The Chief Crown Solicitor.*

G. E. H.

ROSS, BROS., LTD., PLAINTIFFS, v. EDWARD SHAW & Co., *K. B. Div.*
 DEFENDANTS (1).

Contract—Delivery as required—Reasonable time for Delivery—Custom—Foreign Goods—Option to purchaser to select Grades—Contract dependent on Vendor's contract with foreign producer—Country of origin of goods becoming Enemy Territory—Trading with Enemy—Vendor's contract with producers made illegal—Illegality of performance of Contract sued on—Reasonable time for completion—Repudiation by Vendor.

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In a contract in writing for the sale and delivery “as required” of goods, of which the vendor is not producer, and which are known to both parties to be the spin of particular mills, where the purchaser has the choice of numerous varieties of the contract goods, a trade custom that delivery need not be made until a reasonable time to enable the vendor to obtain the goods from the particular mills has elapsed from the receipt of the purchaser's specification, is not an unreasonable custom; nor is such a custom repugnant to or inconsistent with the written terms of such a contract, being explanatory of what is the reasonable time for delivery.

Such a contract must be read as incorporating the custom, and as made expressly in relation to the place of origin of the goods, and therefore as implying that the vendor can legally obtain the goods from the particular mill when the purchaser delivers to him his specification therefor. In this respect, where the vendor is not the manufacturer, the contract for sale and delivery is related to and dependent upon the vendor's contracts with the producers, and the legal possibility of the performance of such latter contracts.

Where a contract for the sale and delivery of foreign goods is made between a British vendor and a British purchaser, and, during its continuance, the country where the goods are manufactured becomes enemy territory by hostile occupation, trading with persons in which is forbidden to British subjects by the laws of the realm, the vendor (if he has not the goods in his possession) may legally refuse to deliver on the ground that to obtain the specified goods is not then legally possible.

Where a contract for sale and delivery “as required” of goods is silent as to time, the law will imply that the specification requiring delivery must be made within a reasonable time after the contract; also, that the contract must be completed within a reasonable time after specification, and such reasonable time for delivery may be explained and controlled by a trade custom or usage.

Where a reasonable time for the completion of the contract has elapsed, and the country where the goods are produced is enemy territory trading with persons in which is illegal, the vendor may repudiate the contract without being obliged to offer delivery of the goods to the purchaser.

Jones v. Gibbons, 10 Ex. 920, considered and distinguished.

(1) Before GIBSON, MADDEN, and PIM JJ.

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MOTION FOR JUDGMENT.

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Motions by the defendants and plaintiffs, dated respectively the 13th of September, 1916, and 9th of October, 1916, for judgment.

The plaintiffs, a firm of weavers in Belfast, brought an action against the defendants, yarn merchants in Belfast, for damages for breach of two contracts, dated 4th of March, 1914, and 10th of April, 1914, for the sale and delivery by the defendants to the plaintiffs of certain specified yarns.

The contracts on which the action was brought were called in the trade "open" contracts. Each contract was in writing and in identical terms, and each was for the sale and delivery "as required" of 5004 bundles of yarn, 32, 35, and 40 leas, marked "L. S." or "17," at the price of 6s. 10½d., 6s. 6d., and 6s. per bundle respectively. The numbers 32, 35, and 40 represented different qualities, from any one or more of which the purchaser was entitled to choose. The marks "L. S." and "17" represented respectively the "spin" or produce of particular mills, both of which mills were Belgian. "L. S." represented the "spin" of the "Société Anonyme de La Lys," of Ghent, and "17" the "spin" of the "Société Anonyme Linière La Liève," of Ghent. The defendants, as yarn merchants, bought yarns from various mills, and sold them to weavers. The breach alleged was failure to deliver on the 8th and 11th of October, 1915.

The main defence relied on was that, by the general and notorious custom of the yarn trade in Belfast, in accordance with which the contracts were made, it was a term of the contracts that the defendants had not to order forward from the manufacturers in Belgium the yarns required to be delivered under the contracts to the plaintiffs, unless and until the plaintiffs had sent or given to the defendants a specification stating of what number of bundles of each kind of the contract yarn the plaintiffs required delivery, and during the continuance of the contracts, and before any breach by the defendants, and before the plaintiffs had sent any such specification, the King's enemies took and had retained possession of all the factories of the producers of the contract yarn, and had prevented the yarns from being manufactured or

conveyed to Ireland, and that the performance of the contracts by the defendants had been rendered impossible. The plaintiffs contended that such custom did not in fact, and could not legally, exist.

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The action was tried before Lord Justice Molony and a special jury of the county of the city of Belfast on the 3rd, 4th, and 5th of August, 1916. The writ in the action was issued on 31st of January, 1916. Mr. Frederick Shaw, the sole representative of the defendant firm, gave evidence to show that prior to the occupation of Ghent by the Germans on 13th of October, 1914, he had fulfilled all orders, the supply of substitutes "D. D. X." and "S. W.," on September 16th and 23rd, 1914, being accepted by the plaintiffs; that the last specification received in 1914 was on 5th of October; that in October, 1914, either on the 20th or 27th, he had told the plaintiffs' manager that it was impossible to get "L. S." or "17," and that in June, 1915, he had repudiated the contract. The plaintiffs' manager, Mr. Watson, in his evidence stated that Mr. Shaw had from time to time stated that he could not get the yarns, and when he could get it he would supply the plaintiffs; that there was no repudiation of the contract in October, 1914, and that in June, 1915, Mr. Shaw had refused to supply either the contract yarns or substitutes. He admitted he contracted for the supply of Continental yarn. Evidence was given by the defendants' witnesses with relation to the custom alleged in the defence, and also as to the reasonable time for the completion of such open contracts, which was stated to be twelve months. The plaintiffs' counsel objected to the admission of the evidence as to the custom, on the ground that the custom alleged was inconsistent with and repugnant to the contracts, and was unreasonable; they also objected to the admission of the evidence as to the reasonable time for completion. The learned judge admitted the evidence as to the custom, holding that the question of its reasonableness was for the jury, and that the question of repugnancy was open for further discussion: he also admitted the evidence as to reasonable time for completion, subject to the consideration of *Jones v. Gibbons* (1), with which he was inclined to agree. At the close of the defendants' case, the plaintiffs' manager and other witnesses

K. B. Div. were called to rebut the evidence of the alleged custom. The
 1916. defendants entered a memorandum from the Secretary of State,
 Ross stating that Ghent was occupied by the Germans on 13th of
 Shaw & Co. October, 1914.

The following were the questions submitted to the jury, with their answers thereto:—

“1. Did the defendants on 27th of October, 1914, repudiate and refuse to carry out the contracts?” Answer—“No.”

“2. Did the defendants in June, 1915, repudiate and refuse to carry out the contracts?” Answer—“Yes.”

“3. Did the defendants on 11th of October, 1915, repudiate and refuse to carry out the contracts?” Answer—“Yes.”

“4. Had a reasonable time for the performance of the contracts expired before (a) 27th of October, 1914? Answer—“No.” “(b) June, 1915?” Answer—“Yes.” “(c) 11th of October, 1915?” Answer—“Yes.”

“5. Is there a custom in the yarn trade in Belfast that in an open contract for the sale of yarn (such as in the present case) the merchant is not bound to get the goods into his possession until he receives a notice from his customer of the quantity, mark, and number he requires, and a reasonable time has elapsed to enable the merchant to get the goods forward from the mill?” Answer—“Yes.”

“6. Was it possible for the defendants on 27th of October, 1914, or within a reasonable time afterwards, to procure yarn to comply with the contract (a) from Belgium?” Answer—“No.” “(b) In the open market?” Answer—“No.”

“7. If the contracts were broken on 27th October, 1914, and the plaintiffs are entitled to recover, assess damages.” “£640 15s. 7d.”

“8. If the contracts were broken in June, 1915, and the plaintiffs are entitled to recover, assess damages.” “£1039 2s. 2d.”

“9. If the contracts were broken on 11th October, 1915, and the plaintiffs are entitled to recover, assess damages.” “£1420 2s. 2d.”

The learned judge's note concluded as follows:—

“*Henry K.C.*: ‘I ask for a direction that the evidence of the alleged custom is not admissible to contradict a written document, and that the alleged custom as proved has none of the requisites

of a valid custom. The defences as to the impossibility of delivery are no answers to a pre-war contract of this description.' *Bates K.C.* *K. B. Div. 1918.*
 adds, that assuming the custom to be proved, it does not afford a legal defence to the action. I refused to direct. I state the questions I intend to leave to the jury. I added the fourth question at the request of the Attorney-General, although on the authority of *Jones v. Gibbons* (1) I thought it did not arise. The Attorney-General asked me for a direction on question 6, but I thought it better that this question should be left to the jury. *Ross v. Shaw & Co.*

"I charged the jury, explaining fully the requisites of a valid custom and the nature of the evidence necessary to establish it. I also told the jury that in considering their answer to question 4 about a reasonable time, they were entitled to take into consideration all the circumstances, including the fact that the war had supervened. At the close of my charge, Wilson K.C. objected that "reasonable time" meant reasonable time in the abstract, and had no reference to the circumstances of the particular case, and asked me to recall the jury upon this point. I declined. No other objection was made to my charge. The jury answered the questions as in the certificate.

"The amounts found by the jury in answer to questions 7, 8, and 9 were agreed on between the parties. Upon their findings I abstained from giving judgment, leaving the parties respectively to move the Court for such judgment as they might be respectively advised; and I directed that if both parties should serve notices of motion for judgment both applications should be heard together."

The Attorney-General (Right Honourable James H. Campbell K.C. M.P.), (with him D. M. Wilson K.C. and Robb) for the defendants:—

In these open contracts the purchaser has the option of choosing from a number of different qualities; if it were necessary for the vendor to keep in stock all these different qualities, so that on a specification by the purchaser the quality specified for could be at once drawn from stock, the burden cast upon the vendor would be so great that no business would be possible. The custom found,

K. B. Div being an essential condition to the carrying out of such open
 1916. contracts, is not unreasonable: *Syers v. Jones* (1); *O'Neill v.*
Ross *Bell* (2); *Bowes v. Shand* (3); Halsbury, Laws of England, vol. x,
v. article 484. In *Cuthbert v. Cumming* (4), where the contract was
SHAW & Co. for a "full and complete cargo," a custom which had the effect of
 not giving to the consignee a full cargo was held reasonable.

The custom found is neither inconsistent with nor repugnant to the contracts. The contracts are for delivery as required, and are silent as to time for delivery. The law implies that delivery shall be made within a reasonable time. The custom is explanatory of the reasonable time for delivery. The principle on which evidence of such custom is admitted is well stated by Lord Coleridge in *Brown v. Byrne* (5). He says:—"Merely that it varies the written contract is not enough to exclude the evidence; for it is impossible to add any material incident to the written terms of a contract without altering its effect more or less. Neither in the construction of a contract among merchants, tradesmen, or others, will the evidence be excluded because the words are in their ordinary meaning unambiguous; for the principle of admission is that words perfectly unambiguous in their ordinary meaning are used by the contractors in a different sense from that. . . . In such cases the evidence neither adds to, nor qualifies, nor contradicts, the written contract; it only ascertains it by expounding the language."

The contracts are also silent as to the time for completion; that period must also be a reasonable time, and the jury has found that the defendants repudiated the contracts in June 1915, and that at that date the reasonable time for the completion of the contracts had elapsed. *Jones v. Gibbons* (6) would apply where there was a fixed contract and no circumstance like in the present case which prevented the defendants from offering delivery. Here before the reasonable time for completion had elapsed, through no fault of theirs, the defendants were disabled from supplying the yarns: the war had begun, and the source of supply was in

(1) 2 Ex. 111.

(2) 1 R. 2 C. L. 68.

(3) 2 A. C. 455.

(4) 10 Ex. 809; 11 Ex. 405.

(5) 3 Ell. & B. 703, at pp. 715, 716.

(6) 8 Ex. 920.

the hands of the enemy. Under the enactments (1) as to trading *K. B. Div.*
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(1) The Trading with the Enemy Proclamation, No. 2, of September 9th, 1914 (1914, No. 1376, Statutory Rules and Orders, 1914, vol. iii, p. 326), by sect. 5, provides:—"We do hereby accordingly warn all persons resident, carrying on business or being in Our Dominions not directly or indirectly to . . . obtain from an enemy country or an enemy any goods, wares, or merchandise, nor directly or indirectly to . . . obtain from any person any goods, wares, or merchandise for or by way of transmission to or from an enemy country or an enemy, nor directly or indirectly to trade in or carry any goods, wares, or merchandise destined for or coming from an enemy country or an enemy . . . And We do hereby further warn all persons that whoever in contravention of the law shall commit, aid, or abet any of the aforesaid acts is guilty of crime and will be liable to punishment and penalties accordingly."

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"Enemy country" and "enemy" are defined by sections 2 and 3 as follows:—

(2) "The expression 'enemy country' in this Proclamation means the territories of the German Empire and of the Dual Monarchy of Austria-Hungary, together with all the colonies and dependencies thereof."

(3) "The expression 'enemy' in this Proclamation means any person or body of persons of whatever nationality resident or carrying on business in the enemy country, but does not include persons of enemy nationality who are neither resident nor carrying on business in the enemy country. In the case of incorporated bodies, enemy character attaches only to those incorporated in an enemy country."

The Trading with the Enemy Proclamation of September 14, 1915 (1915, No. 903, Statutory Rules and Orders, 1915, Vol. iii, p. 275), provides as follows:—

"Whereas doubts have arisen as respects the position under the Proclamations for the time being in force relating to trading with the enemy of incorporated companies or bodies of persons which, though not incorporated in an enemy country or in territory in hostile occupation, carry on business in any such country or territory.

"And whereas it is expedient that the position of those companies or bodies for the purposes of those Proclamations should be defined:—

"Now, therefore, We have thought fit, by and with the advice of Our Privy Council, to issue this Our Royal Proclamation declaring, and it is hereby declared, as follows:—

"For the purposes of the Proclamations for the time being in force relating to trading with the enemy, the expression 'enemy,' notwithstanding anything in the said Proclamations, is hereby declared to include, and to have included, any incorporated company or body of persons (wherever incorporated) carrying on business in an enemy country or in any territory for the time being in hostile occupation."

K. B. Div. with the enemy, the contracts had become illegal: *Howell v. Coup-*
1916. *land* (1); *Taylor v. Caldwell* (2); *Geipel v. Smith* (3); *Mellar v.*
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Denis Henry K.C. and Bates K.C. (with them *James Andrews*)
 for the plaintiffs:—

The marks “L. S.” and “17” are the defendant company’s private marks: to the purchaser they denote a special kind of yarn, and not the place of origin. The contracts are for the sale and delivery as required of a special kind of yarn of the grades 32, 35, or 40, and are on their face contracts between Belfast vendors and purchasers to be executed at Belfast. The contracts are clear and unambiguous, and “delivery as required” relates to delivery as required by a Belfast purchaser from a Belfast vendor. The reasonable time for delivery on request or specification is the reasonable time in relation to a contract between Belfast vendors and purchasers: the country of origin of the goods is not the basis of the contract. It might as well be said that on a contract for the sale and delivery of figs the purchaser would have to wait till the vendor got forward figs wherever the delivery was to be as required.

The custom alleged and found sets up a new and inconsistent contract. The contracts here are plain, and, as Lord Lyndhurst says in *Blachet v. Royal Exchange Assurance Co.* (5), “Usage may be admissible to explain what is doubtful, but it is never admissible to contradict what is plain.” Lord Halsbury, in *Tuncred Arrol Co. v. Steel Co. of Scotland* (6), at pp. 129, 130, says, “The next point insisted on is that we can cut down and override the contract, and the language in which it is conceived, by some sort of custom. . . . My Lords, upon that subject I do not take quite the same view as is taken by some of my noble and learned friends. I do not mean to say that there has not been some looseness in the application of the rule in some of the English cases. I think there undoubtedly has; and some evidence has

(1) 1 Q. B. D. 258.

(2) 3 B. & S. 826.

(3) L. R. 7 Q. B. 404.

(4) [1916] 1 K. B. 402.

(5) 2 Tyrwhitt 266, at p. 274.

(6) 15 A. C. 125.

been admitted which, on a stricter view of the authorities, would, *K. B. Div.*
 I think, now be rejected; but I think the principle is . . . you 1916.
 may translate the words of a contract, you cannot vary or alter Ross
 it." There is no need to translate the words "delivery as v.
 required." They are plain and ordinary words, frequently used SHAW & Co.
 in contracts, and have a clear meaning: *Ford v. Newth* (1). What
 the defendants really seek to do is to set up a new contract,
 inconsistent with the obligation to which they have bound them-
 selves.

The custom alleged is unreasonable. The purchaser deals
 with the vendor as the direct vendor of the contract goods. It is
 no answer to say that the vendor would have to keep an enormous
 stock of two varieties of yarn, and three grades of each variety.
 In the first place, in practice, the vendors would stock on average
 demand; in the second place, they made the contract with the
 attendant incidents and risks. Where the contract on its face
 is one between a home vendor and a home purchaser, without
 reference to the place of origin of the goods, it is unreasonable
 to introduce a condition that the purchaser is to wait till the
 vendor has ordered forward from the foreign producer.

The jury has found that a reasonable time for completion had
 elapsed in June, 1915; but the vendors did not offer the goods
 to the plaintiffs before repudiating. In *Jones v. Gibbons* (2),
 argued on demurrer, it was assumed that the reasonable time
 for performance had elapsed, and there it was held that before
 repudiation the vendor must offer to supply the contract goods.
 The case is exactly in point, and rules this case on this contention.

The defendants seek release from their obligation by reason
 of the war. The contract, according to them, has been made
 impossible and illegal. The general rule of law is that impos-
 sibility of performance is no answer to an action for breach of
 contract: *Jacobs Marcus & Co. v. Crédit Lyonnais* (3). The nature
 and subject-matter of the contracts do not bring them within any
 of the exceptions to this rule, and the decisions in *Taylor v.*
Caldwell (4) and *Howell v. Copeland* (5) are not applicable.

(1) 70 L. J. K. B. 459.

(2) 8 Ex. 920.

(3) 12 Q. B. D. 589, at pp. 598 and 603.

(4) 3 B. & S. 820.

(5) 1 Q. B. D. 258.

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The contracts are not made illegal by the proclamations: *Société Anonyme de Belge v. Anglo-Belgian Agency* (1). Even if the decision in that case is affected by the subsequent proclamations of the 14th September, 1915, the defendants' repudiation was prior in date. In any case, the contract here is not between a national and an alien, but is between national and national. There is nothing to prevent loyal subjects contracting for the supply of foreign goods without any actual breach of duty.

D. M. Wilson K.C., in reply:—

The last specification here was in October, 1915, after the war had begun, and the writ was not issued till January, 1916. *Société Anonyme de Belge v. Anglo-Belgian Agency* (1) has been overruled by the proclamation of the 14th September, 1915, and that proclamation is expressly retrospective in effect.

Cur. adv. vult.

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GIBSON J.:—

Jan. 15.

This case comes before us on cross motions for judgment on the findings of the jury. We are not asked for a new trial on the basis that the findings are wrong, or to get further findings; and the Court must draw inferences of fact not inconsistent with what the jury have found under our Judicature Order 40, Rule 9. The controversy relates to two contracts for the supply of yarn, dated respectively the 4th March, 1914, and 10th April, 1914, each for 5004 bundles of leas yarn, under the number 32, 35, or 40, marked "L. S." or "17," at specified prices. The proposal for purchase was contained in a short memorandum from the plaintiffs, who are Belfast weavers, and was accepted orally by the defendants, who are Belfast yarn merchants. In the margin there are written the words "delivery as required," upon the effect of which our decision must mainly depend. On the evidence I infer as facts—1, that the plaintiffs, who had long been dealing with the defendants, knew that the numbers and letters "L. S." and "17" denoted the manufacture of Belgian spinners; 2, that such letters and figures represented not merely standard of quality, but the produce of particular Belgian manufacturers, and were part of the essential trade description under which the yarn was sold,

though the identity of the spinning firms—"L.S.," the Lys Company, and "17," the La Liève Company—was not disclosed ; 3, that both parties knew of the custom when they entered into the contract. The contracts were what is called "open," as distinguished from "fixed," contracts, and enabled the purchaser to call for the entire yarn from one number and one description, whether "L.S." or "17." The purchasers from time to time necessarily had to inform the sellers how they proposed to exercise their option, and this was done by what is called a specification, whether oral or written. This action has arisen out of the war, up to which time, August 4th, 1914, there was no cause of complaint. On August 11th the plaintiffs got lots of "L.S." and "17," and on October 6th a lot of "17." On September 16th and 23rd they received lots of other "spins," which they accepted in substitution. They were working on short time after the war, and their stock of No. 40 was exhausted in December, 1914, and in January, 1915, their stock of No. 35 was reduced to 180 bundles. In June, 1915, the defendants repudiated liability under the contract, and thus discharged the plaintiffs from any obligation to deliver further specifications: *Braithwaite v. Foreign Hardware Co.* (1). A specification for the whole undelivered balance was delivered in October, treating the contract as still open. Nothing that could constitute an actionable breach of contract was proved or found by the jury before the repudiation in June, 1915. Ghent, from which the yarn was to come, was in enemy occupation from October 13th, 1914, from which date communication and business with Belfast were stopped.

The contract was an informal commercial document to which the principle stated by Lord Campbell in *Humfrey v. Dale* (2) applies. Business men leave unwritten what they take for granted. The meaning of trade language is ascertained by a jury: *Myers v. Sart* (3); *Bissell v. Beard* (4); *Symonds v. Lloyd* (5). Two matters in this contract seem to be left to implication. The first is its duration. Within what period were the plaintiffs to exercise their option? When, if the plaintiffs did not take delivery, could

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(1) [1905] 2 K. B. 543.
(2) 7 E. & B., at p. 278.
(3) 3 E. & E. 306.

(4) 28 L. T. 140.
(5) 6 C. B. N. S. 691.

K. B. Div. the defendants say that there was an actionable breach? The
 1917. second is, what was the reasonable time for delivery after the
 ROSS plaintiffs specified to defendants what yarn by number and
 v. description they required? This is a question of fact: Sale of
 SHAW & Co. Goods Act, 1893, c. 71, sects. 55 and 56; having regard to the
 Gibson J. nature of the contract and the nature of the goods: *Hydraulic Engineering Co. v. McHaffie* (1); and the circumstances. Mr. Henry contends that the defendants were bound to have in Belfast ready at any time for total delivery 10,080 bundles under each of the numbers and denominations, and that reasonable time for delivery after specification was to be measured by the time required for packing and transport from defendants' Belfast warehouse to the plaintiffs' mill. The proposed construction would impose on the sellers liability to have in store in Belfast 30,240 bundles of each denomination, "L. S." and "17," that is 60,480 bundles altogether, which they would have to pay for to the Belgian firms, though the yarn might never be required. As sometimes in these open contracts the numbers on which the option is to exercised run up to twelve and even twenty, the situation resembles what would be rather an insane gamble than a mercantile transaction. Mr. Henry's answer that the risk should have been guarded against by express terms, and that the risk is speculative and unlikely, as the defendants would be dealing with average general requirements of the trade, is not convincing. The sellers would be at the mercy of the purchasers.

This brings me to a question not argued, but suggested to me by the evidence of the plaintiffs' witnesses examined at the close of the defendants' case. What is the business meaning of the expression "as required"? *Jones v. Gibbons* (2), decided on demurrer, gives here no help. According to Mr. Henry the phrase means only "as and when requested by the plaintiffs"; so that, the day after contract, the plaintiffs could have sold the goods to another merchant or could have at once demanded complete delivery, though not wanted for their mill. Some, however, of the plaintiffs' witnesses state that the seller would not be expected to have in hand more than a reasonable proportion to meet the demand of the mill, which they fix at about 10 per cent. The replication

(1) 4 Q. B. D. 670.

(2) 8 Ex. 920.

in *Jones v. Gibbons* (1) represents something of the kind. I think, though it is not necessary to decide, that in this short mercantile note of contract the effect of the expression would be a jury question. I also think that "reasonable time" would not be a matter of direction in favour of the interpretation of the contract proposed by Mr. Henry.

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Passing from these considerations, not directly connected with custom, I turn to the custom found. It is not challenged as unproved, or unreasonable, or uncertain. If the Belgian spinners had no yarn available when defendants transmitted the order, that would not affect the plaintiffs' right against the defendants, whose contract was absolute. The custom assumes that there is a sufficient stock of yarn abroad subject to the vendors' disposition to meet orders when transmitted to them, and it purports to regulate the reasonable time for delivery by reference to the locality of the foreign yarn. The only open contracts to which the custom was sought on the evidence to be applied were in connexion with Belgium, between which and Belfast the relations seem to be close and constant. Whether similar open contracts are in use for other Continental yarn, and whether the custom extends to such contracts, I do not pause to consider. "Deliver as required" means "within a reasonable time as required," and such reasonable time is interpreted by the custom. If the custom was written into the contract—which is the test: *Humfrey v. Dale* (2)—there would be no inconsistency. The authorities seem conclusive. In addition to those already mentioned, I may refer to *Produce Brokers' Co. v. Olympia Oil and Cake Co.* (3); *Re Walkers* (4); *British and Mexican Shipping Co. v. Locketts Bros.* (5); and *Field v. Lelean* (6). The Sale of Goods Act, c. 71, sect. 55, is to the same effect. I am, therefore, of opinion that the custom, to which Mr. Henry confined his argument, was incorporated with the contract as an implied term.

On that assumption Mr. Bates advanced an argument (not

(1) 8 Ex. 920.

(2) 7 E. & B. 275, 278.

(3) [1916] 1 A. C. 314; [1916]
2 K. B. 296; W. N. [1916] 403 C. A.

(4) [1904] 2 K. B. 152.

(5) [1911] 1 K. B. 264.

(6) 6 H. & N. 617.

K. B. Div. put forward or adopted by Mr. Henry) that the custom only
 1917. regulated time; that time was to be measured irrespective of war;
 Ross and that inability to get the yarn, from any cause whatever, was
v. a risk attaching to the vendors. He relied on *Jacobs Marcus*
SHAW & Co. & *Co. v. Crédit Lyonnais* (1), where, in an English contract,
 Gibson J. governed by English law, it was held that performance was not
 excused by reason of a prohibition of the French authorities at
 the port of shipment.

The problem before us, however, is different. It relates to illegality or impossibility created by our own law in consequence of war. Taking the contract embodying the custom as meaning that the yarn was to be drafted from Belgium (where meanwhile the contract assumes it might be legitimately kept), in pursuance of notifications delivered by the buyers to the sellers, the price of each lot when delivered constituting a debt referable to the primary contract, what was the effect of the war and the occupation of Belgium on the contract and its fulfilment? The situation is not one where the inability to carry out the contract results from enemy blockade, or stoppage of trade routes, or destruction of a mail steamer carrying the order or of the cargo vessel returning. Suppose Belfast as well as Belgium was held by the enemy, could the plaintiffs serve a specification and insist that reasonable time was to be deemed to run at once? The delivery of each lot ordered would make a debt from plaintiffs to defendants, and from defendants to the Belgian companies. The constitution of these companies was not proved, nor is there any evidence of what is the Belgian law regulating them, whether they are local or created by the general law of the country, as is likely. The contracts to be performed as contemplated by the custom assumed as a tacit condition that delivery could, as regards our own law, be legally carried out from Belgium. Once Belgium became an enemy territory by reason of German occupation this was impossible. The facts in *Société Anonyme de Belge v. Anglo-Belgian Agency* (2) were unlike those before us, where the whole management of the company was in German hands. The proclamation of the 14th of September, 1915, the validity of which was not challenged, is declaratory,

(1) 12 Q. B. D. 589.

(2) [1915] 2 Ch. 409.

and implies that the decision was based on misconstruction of the earlier proclamations. *Daimler Co. v. Continental Tyre Co.* (1) shows that the companies, being under enemy control, could not have lawful business relations with Belfast. *Horlock v. Beal* (2), *Moss v. Donohoe* (3), and *Jager v. Tolme & Runge* (4) also illustrate the effect of war on contracts. If import of goods from Belgium had been expressly prohibited by statute, would not such prohibition have made performance in the manner contemplated by the custom unlawful? Taking the custom as part of the contract terms, I am of opinion that when the writ was issued, on the 31st of January, 1916, there was no enforceable cause of action. The claim appears to treat the non-compliance with the specification of October, 1915, as the actionable breach. The plaintiffs could have treated the repudiation of June, 1915, as a violation of the contract, but they were not bound to do so: *Avery v. Bowden* (5); *Johnstone v. Milling* (6). But the rights to treat the contract as broken in June, or as, notwithstanding defendants' repudiation, still unbroken and enforceable, were incompatible, and could not be asserted simultaneously: *Smith v. Butler* (7).

A further point was made by the Attorney-General, that the contracts had ceased to be enforceable by reason of lapse of time in June, 1915. The plaintiffs' answer to this was the case of *Jones v. Gibbons* (8). They did not rely on any negotiation from which a tacit extension of time might be inferred, nor was any question suggested for the jury as to any such extension, if there was evidence to support it. Their case, on this branch of it, was staked on the application of *Jones v. Gibbons* (8). In the report in 22 L. J. Ex., at p. 348, Baron Alderson is reported as observing that the contract as pleaded (which Mr. Bramwell argued was for specific iron, the property in which passed), was not for delivery within a reasonable time, as to which the declaration contained no averment, but the time was left open. Whether this point was

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(1) [1916] 1 A. C. 307.

(2) [1916] 1 A. C. 496.

(3) 32 T. L. R. 343.

(4) [1916] 1 K. B. 939.

(5) 6 E. & B. 962.

(6) 16 Q. B. D., at p. 470.

(7) [1900] 1 K. B., at pp. 697,
698.

(8) 8 Ex. 920.

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 1917. present situation where the contract and circumstances were very
 Ross different. It was decided on demurrer in reference to an English
v. contract for specific iron; there were no circumstances disclosed
 SHAW & Co. which could be what Lord Esher describes as "mercantilely
 Gibson J. reasonable": *Sanders v. McLean* (1). If the reasonable time for
 performance, according to commercial usage, as ascertained by the
 jury, was written into and expressed in the contract, why should
 that time limit be allowed to be exceeded when, as both parties
 knew, delivery had become impossible, and when the defendants
 in June, 1915, had definitively repudiated further liability owing
 to the yarn being no longer legally procurable? How long were
 the plaintiffs to be at liberty to treat the contract as open and
 enforceable? They hoped, no doubt, that things would improve,
 and deferred specifying for delivery, but their speculative anticipa-
 tion was falsified, with the result that the loss from increase of
 price and inability to procure equivalent yarn was, as the answers
 of the jury demonstrate, enormously increased. In mercantile
 contracts of the present type, subject, even apart from war dis-
 turbance, to variations of price and supply, time may be an
 essential condition: *Reuter v. Sala* (2); Benjamin on Sales,
 5th ed., pp. 587, 588. The equitable principle as to treating
 time as not essential only applies where, from the nature of the
 property and the circumstances, it is not inequitable to modify
 the prima facie time limit: *Tilley v. Thomas* (3). Hence it does
 not extend to property subject to fluctuation in value: Dart,
 V. & P., 6th ed., p. 484. The plaintiffs cannot by postponing
 their demand prejudice the defendants by enhancing their
 liability. With the progress of the war the commercial situation,
 as regards price and supply, would and did grow steadily worse.

If the war is excluded (as plaintiffs contend), as irrelevant to
 the plaintiffs' contractual rights, and if the contract is interpreted
 (as they insist) as imposing an unqualified and continuous obliga-
 tion always to have the whole yarn ready for prompt delivery in
 Belfast, would not the reasonable time for performance ascertained
 by the jury have been exceeded to such an extent in this com-
 mercial bargain as to make extension of time inequitable and

(1) 11 Q. B. D., at p. 337. (2) 4 C. P. D., at p. 249. (3) L. R. 3 Ch., at p. 67.

contrary to the intent of the contract? The defendants' repudiation and the existence of war conditions made prompt action imperative. When the defendants repudiated in June, 1915, if the contract was still enforceable, why did the plaintiffs defer their election (if they were entitled to elect within *Avery v. Bowden* (1)) to treat the contract as still open and unbroken till October, 1915, a further delay of several months? The actionable breach of contract is based on the October specification. On the plaintiffs' view of their contractual rights, how long were they to be entitled to insist on performance? Were they entitled to demand delivery of all arrears forthwith at any time they chose? They thought it wise in the earlier stages of the hostilities to postpone the decision of their rights by law, but the speculation as to the restoration of peace or improvement of commercial conditions was on their own responsibility and has aggravated the damage and loss. There is no pleading or finding which would found in the circumstances any enlargement of the reasonable time for performance ascertained by the jury—an ascertainment which was accepted without question. *Jones v. Gibbons* (2) does not apply to the present facts. On the findings as they stand, the plaintiffs would not, I think, in any view, be entitled to judgment.

Verdict and judgment will be entered for the defendants with costs, including costs of this motion.

MADDEN J. concurred with the judgment of Gibson J.

PIM J.:—

I agree. All that *Jones v. Gibbons* (2) decided was that, before repudiating a contract to deliver, the promisor, if he possesses or can acquire the goods, is bound to say to the promisee, "I am now prepared to deliver the goods if you will take them." But that pre-supposes that the promisor is in a position to acquire and deliver the goods. Supposing it becomes impossible for the promisor to acquire the necessary goods, what is his duty? It seems to me he should do exactly what, in this case, the defendants did. The defendants went to the plaintiffs and said: "It is impossible for us to deliver. Ghent is occupied by the Germans,

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(1) 6 E. & B. 962.

(2) 10 Ex. 920.

K. B. Div. and the mills are in the possession of the enemy." What more
 1917. could the defendants have said or done? The plaintiffs might,
 Ross on receiving this information, have demanded delivery, and might
v. have brought their action for breach on non-receipt of the goods.
SHAW & Co. I do not say that they would have been successful in such action,
 Pim J. but the case would have been very different from the case before
 us to-day.

In the view I have taken of *Jones v. Gibbons* (1), the question of "reasonable time" becomes of the greatest importance. In October, 1914, the defendants told the plaintiffs' manager, Mr. Watson, that they could not deliver. There appear to have been many conversations between the plaintiffs' manager and the defendants during the following winter and spring, but it is admitted that the plaintiffs never sent a specified claim to the defendants during that period. It is not even alleged that any specified claim was delivered before June, 1915, that is, until a period had elapsed, one year and three months after the date of the first contract, and one year and two months after the date of the second contract. Mr. Watson says that he verbally asked for delivery of 300 bundles of numbers 35 and 40 in June. The defendants deny this; and I infer that if any such claim was made, it was wholly informal. In June, the defendants repudiated the contracts. A mass of evidence has been given as to what would be the reasonable time for the completion of these contracts. No witness exceeded the period of twelve months, and Mr. Watson himself said that twelve months would be a reasonable time. The jury has found that before June the reasonable time for the completion of the contracts had elapsed, and further has found that the defendants in June repudiated them.

A number of witnesses came forward to testify to the existence of the custom, and some of the plaintiffs' own witnesses gave strong evidence in its support. I will only refer to the evidence of two of the plaintiffs' witnesses: Mr. Faulkiner of the Bessbrook Weaving Company said that, "In open contracts of this kind, I would not apply for the whole at once. I have never considered that was my right. I have found twelve to fourteen varieties in a contract. I expect he would anticipate my requirements, and

(1) 10 Ex. 920.

have an assorted stock—about 10 per cent. If I wanted a large quantity, I would give him notice.” Mr. Maxwell, Managing Director of the Durham Street Weaving Company, said: “The seller is not supposed to have the full amount, only a reasonable proportion. I agree with Mr. Faulkner—about 10 per cent. . . . I do not suggest I would be entitled to ask for the whole without notice to the vendor, and a reasonable time elapses.” Reasonable time for what? Obviously for delivery of the goods. From where? Not from Belfast or London, but from where the specific goods were made and obtainable, namely, from the mills. “No broker would be expected to keep the enormous stocks in hand which could be necessary to meet forthwith the possible claims of a purchaser who had a variety of options. I should be astonished if the custom did not exist, for it seems to me that business could not be carried on without it.”

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But it is argued, even if the custom exists, it is repugnant to and inconsistent with the contracts to “deliver when required.” Is it? The law itself adds to such a contract the words, “within a reasonable time,” and the Courts have to ascertain what a reasonable time is. That is in itself a kind of universal custom adopted to meet the physical difficulties to which all human affairs are subject.

The custom of Belfast, as proved, is nothing more than an explanation of what a reasonable time in Belfast in connexion with such contracts in fact is. In the well-known case of *Bowes v. Shand* (1) Lord Cairns lays it down that the use of custom is to explain or enlarge the terms of the contract. That is exactly the use to which custom has been put in this case. I am clear that the custom is neither repugnant to nor inconsistent with the words of the contracts.

Mr. Bates has argued that, while admitting that the contracts here, if made between a national and an alien, would have been determined by the proclamation of the 14th September, 1915, yet, as the contracts are in fact between two nationals, the defendants are bound to get the yarn from somewhere, if they cannot get it from Ghent, and that impossibility is no answer in law. He quotes several cases in support of this doctrine, which I need

(1) L. R. 2 A. C. 455.

K. B. Dw. not go into. There would be something, perhaps a great deal, in
1917. the argument, if the custom had not been proved; but, once the
Ross custom is admitted, the doctrine relied on by Mr. Bates does not
v. apply.
SHAW & Co.

Pim J.

Now, what effect had the proclamation of the 14th September, 1915? I infer from the evidence that the plaintiffs knew when they entered into the contracts that they had ordered Belgian yarn, and I further infer that the plaintiffs knew that the defendants would have to get the yarn from Belgium before they could supply it. The proclamation made all contracts with countries in the occupation of the enemy null and void. The contract between the defendants and the Belgian millers ceased to exist. In my opinion, any contract dependent upon such void contract, if it had been entered into with knowledge of such dependency, also became null and void. To hold otherwise would be to penalize the defendants here for not attempting to break the law. In the view I have taken it was, perhaps, unnecessary for me to express any opinion on this branch of the case, but, if it were necessary, I would be prepared to hold that the contracts were determined by the proclamation.

On every ground it appears to me that the plaintiffs' case fails; and I agree that the verdict and judgment should be entered for the defendants, with costs, including the costs of this motion.

Solicitors for the plaintiffs: *E. & R. W. Bates.*

Solicitors for the defendants: *L'Estrange & Brett.*

C. N. K.

VINCENT FORTE, APPELLANT, v. HENRY M'ALISTER,
RESPONDENT (1).

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1916.

Nov. 13.

1917.

April 17, 20.
May 13.

Justices—Betting house—Betting Act, 1853 (16 & 17 Vict. c. 119)—Game in which prizes are given for success, and in which an entrance fee is required in advance—Automatic machine—Case Stated—Case remitted to Justices for further findings of fact—Duty of Justices.

The offences aimed at by the Betting Act, 1853 (16 & 17 Vict. c. 119), are offences in relation to betting pure and simple, that is, transactions in which none of the parties has any interest other than the sum or stake he will win or lose.

Where a player is required to pay in advance an entrance fee in order to be allowed to compete in a game in which prizes are offered for success depending upon the individual acts of the players in playing the game, the possibility of winning such prizes or of losing the entrance fee if unsuccessful is not the sole consideration for the player's participation, and the entrance fee so paid is not a deposit "as consideration for an undertaking to give a valuable thing upon a contingency relating to a game" within sect. 1 of the Betting Act, 1853 (16 & 17 Vict. c. 119).

Peers v. Caldwell; *Taylor v. Caldwell*, [1916] 1 K. B. 371; and *R. v. Caldwell*; *R. v. Brown*, [1917] W. N. 85, 12 Cr. App. R. 210, discussed and not followed.

Where on appeal by case stated the Court remits the case to the magistrates to enter continuances, and to find further facts in answer to questions submitted by the Court, the magistrates should give the parties an opportunity of being re-heard, and, if they so desire, of giving evidence in relation to the facts required to be found. Where the magistrates, without any re-hearing or fresh evidence, find in answer to such questions, at a date long after the original hearing, merely from recollection, the Court may decline to act on such findings, and will certainly so decline, where, in so making such findings, the magistrates state that none of the matters on which the further findings were required was raised before them at the original hearing.

CASE STATED under 20 & 21 Vict. c. 43.

The appellant, Vincent Forte, was charged at a petty sessions in the city of Belfast, on the 15th February, 1916, before Mr. Garrett Nagle R.M. and Mr. M'Creery J.P., in a summons

(1) Before SIR JAMES H. M. CAMPBELL C.J., and MADDEN and GORDON JJ.

K. B. Div. “for that he being the occupier of a certain place known as number
1916. 35 Great Victoria Street, in the city, did knowingly and wilfully
Forte permit the said place to be used for the purpose of money being
v. M’Alister. received from persons resorting thereto by or on behalf of the
owner of a certain automatic machine therein situated as a consideration for an undertaking to give thereafter a valuable thing on a contingency relating to a game contrary to the statute.”

The prosecution was brought by the police under the Betting Act, 1853, 16 & 17 Vict. c. 119, s. 1, and was in relation to the user on the appellant’s premises of an automatic machine, known as “The Clown Automatic Machine.” The machine was similar in many respects to that described in *Donaghy v. Walsh* (1).

It consisted of a box, faced with a transparent glass panel, and containing a perpendicular board. Near the top of the board several pins or pegs projected at right angles to the back of the box. By inserting a halfpenny at the right hand of the machine, and moving a lever at the same side, a ball was released from the top of the box. The ball fell, in full view of the player, through the pins towards the bottom of the machine. About the middle of the machine and behind the glass panel there was the figure of a clown holding a cap in his hand: the cap was a cup. By means of a lever on the left hand side the player could move the clown and cap laterally from one side of the machine to the other. There was no check to this movement within the area over which the falling ball could travel, and it was possible to bring the cup under the descending ball at any place along the horizontal line on which the clown was moved. The object of the player was to catch the falling ball in the cup—an object made more difficult by the irregular descent imparted by the engagement of the descending ball with the projecting pins. If the ball was caught in the cup, the player received by release from the machine a disc which entitled him to get twopence worth of goods from the appellant.

At the hearing the appellant was represented by counsel, Mr. T. W. Brown, and the prosecution was conducted by Mr. Moorhead, crown solicitor. After hearing the evidence the justices convicted the appellant, and fined him forty shillings with costs.

(1) [1914] 2 I. R. 261.

The material facts and conclusions of law as set out in the case *K. B. Div.*
were as follows:— 1916.

The complainant, Constable M'Alister, was called as a witness, and sworn, and examined by Mr. Moorhead, and his evidence was as follows:—"On Saturday, the 15th January, 1916, accompanied by Constable Allen, I went to the shop of the defendant, Vincent Forte, at 35 Great Victoria Street. It is an ice-cream shop. I saw the defendant, Mr. Forte, himself behind the counter. He was in charge. There was a slot machine in the shop, the same as the one produced. The name 'Clown Machine' was indicated on the top of the machine. There were about ten or twelve boys about it. They averaged about fifteen years. They were operating the machine in turn. Most of the boys were taking a turn; other boys came in while I was there; I did not see any girls. I visited the premises on several occasions, and I saw persons on different occasions using this machine. I watched the operations a considerable time, and I saw one of the boys succeed in catching the ball. He then released the handle at the left hand, and a check came out of the bottom of the machine. I tried the machine, and I have a check I got out of it; the check produced is the one; it is marked with a large 2. When any of the boys get a check they hand it to Mr. Forte behind the counter. One boy gave his name as Edward Millar. I watched him; he handed a check Mr. Forte; in return Mr. Forte gave him a plate of peas, and bar of chocolate. I placed twopence in the machine, and on the fourth attempt I got a check. For the first penny I got two balls, and missed them. Next time I got two balls, and with the second one I was successful. I asked the defendant who was the owner of the machine, and he said it belonged to a Manchester firm, I believe, who left it in with him, and he was accountable for the machine while on his premises. The takings of the machine were taken out about once a week by the agent of the owner, who was the sole person who had a key. Mr. Forte had the checks exchanged for sweets, &c. The first thing he got was the value of the checks in hard cash. The next thing was to open out the machine and take out the money belonging to the unsuccessful and successful players. He said he got a percentage of the takings of the

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K. B. Div. machine." Cross-examined:—"Only one of the boys succeeded in getting a disc. I do not know whether all the others were playing or not. They were working at it and speculating at it."

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" Edward Millar, sworn and examined by Mr. Moorhead:—"I reside with my parents, and am an apprentice-mechanic. I remember the 15th January. I was in the ice-cream saloon of Vincent Forte at about 9 o'clock. I placed a penny in the machine, and received two balls, which I lost. I did not catch either. I tried a second penny. I lost the first ball, and got a check for the second. I took it to Mr. Forte. He gave me a plate of peas and a bar of chocolate for it. I was entitled to anything to the value of two pence." Cross-examined:—"I spent twopence, and I got twopence worth. It is great sport working this machine. You have to have your wits about you to catch the ball. Some people are better than others. A great many play it. Some of them are very good at catching the ball."

Mr. Brown quoted for us and relied on the following cases:—*Haigh v. Town Council of Sheffield* (1); *Reg. v. Hobbs* (2); *M'Connell v. Brennan* (3); and submitted that the recent case of *Peers v. Caldwell* (4) had been wrongly decided, and that the dissenting judgment of Lush J. was the more accurate view of the law. Mr. Moorhead, crown solicitor, quoted to us the cases of *Peers v. Caldwell* (4) and *Taylor v. Caldwell* (4), and contended that the facts in the present case were indistinguishable from those in the latter, in which the boys paid their money for the chance of winning a prize; that whether the game was one of skill or chance was immaterial; that the offence was not the mere fact of betting, but the use of premises as a place of resort for persons betting or giving money as the consideration for a chance of winning a prize, which the statute declared to be a common nuisance and illegal.

We, being of opinion that we were bound by the decision in *Peers v. Caldwell* (4) and *Taylor v. Caldwell* (4), held that the Betting Act, 1853, applied to this transaction, and, accordingly, we gave judgment against the defendant.

(1) L. R. 10 Q. B. 102.

(2) [1898] 2 Q. B. 647.

(3) [1908] 2 I. R. 411.

(4) [1916] 1 K. B. 371.

The judgment of the Court is required as to whether we were correct in point of law in our determination as aforesaid, or as to what should be done in the premises.

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The case was stated on the 30th June, 1916, and came before the King's Bench Division on the 13th November, 1916. The Court (Cherry L.C.J. and Gibson J.) sent back the case to the justices to enter continuances, and to answer and find on certain questions of fact, and to re-submit the case for decision.

The questions were as follows:—"1, Was the game in its predominant character (a) one of skill, or (b) one of chance? 2, If the game was not predominantly one of skill, did skill enter into it to a substantial extent? 3, Having regard to the persons contemplated by the defendant as players, were the chances unequal and in the defendant's favour? 4, Supposing persons of average skill, would the chances still have remained unequal and in defendant's favour? 5, Was it necessary, in order to convert the game from one of chance to one of skill, that the player should have practice at it? 6, With practice would a visitor who was a skilled player be able to turn the chances so as to be in his favour? 7, Was the real consideration for the deposit of the money by the player (a) the opportunity of playing the game, or (b) the chance of getting the promised reward?"

Without any rehearing of the case or further evidence the justices on the 14th February, 1917, returned the case. Their answers were as follows:—They answered questions 1 (b), 3, and 4 in the affirmative; questions 1 (a), 2, and 6 in the negative. To number 5 they replied, "No amount of practice would, in our opinion, convert the game from one of chance to one of skill"; and to number 7, "Principally the chance of getting the promised reward."

In conclusion, the justices stated as follows:—"These questions were not raised when the case was before us. It was distinctly stated by the crown solicitor, who prosecuted, that the question whether it was a game of skill or chance was immaterial for the purpose of his case, as the summons was brought under the Betting Act, 1853, and that he relied on the decision given in *Peers v. Caldwell* (1) and *Taylor v. Caldwell*" (1).

K. B. Div. *D. M. Wilson K.C.* (with him *T. W. Brown*), for the appellant:—

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An Act of Parliament which interferes with the liberty of the subject must be strictly construed: *Bows v. Fenwick* (1). The Betting Act, 1853 (16 & 17 Vict. c. 119), was never intended to apply to cases like this. It deals with betting pure and simple: *R. v. Hobbs* (2). There is no bet here: *Carlill v. Carbolic Smoke Ball Co.* (3); *Caminada v. Hulton* (4). In ordinary betting the winner gets back his stake, plus the amount of his bet. Here the winner does not get back his deposit. The case is indistinguishable from the case of a golf competition, with an entrance-fee and prizes. Such a competition would be included under the judgment in *R. v. Caldwell* (5) and *R. v. Brown* (5). If the motive of the player is the test, as suggested in *Peers v. Caldwell* (6), on the facts here the motive of the players was not solely that of winning the prize. The justices find only that it was the principal motive, and, even if that finding can be accepted, in view of their statement that they never considered this question, it does not exclude the motive of desire to play the game, and exercise skill. The true view of the law is that taken by the Scotch courts in *Mackintosh v. Granata* (7) and *Di Carlo v. M'Intyre* (8). The justices' findings in the case, as returned, are not in the circumstances, and on their own statement, judicial findings of fact. [Counsel also referred to *Downes v. Johnston* (9) and *R. v. Cook* (10).]

Serjeant M'Sweeney K.C. and *Cusack*, for the respondent:—

The question here is simply one of law, and is whether the Act of 1853 applies to transactions analogous to betting. The preamble refers to "like contingencies," and must be given some force, and the decision in *R. v. Stoddart* (11) is directly in point as to the scope of the Act with reference to transactions analogous to

(1) L R. 9 C. P. 339.

(2) [1898] 2 Q. B. 647.

(3) [1892] 2 Q. B. 484, at p. 491.

(4) 60 L. J. (M. C.) 116.

(5) [1917] T. L. R. 231; [1917] W. N. 85; 12 Cr. App. R. 210.

(6) [1916] 1 K. B. 371.

(7) 53 Scots. L. R. 766.

(8) [1914] S. C. J. 60.

(9) [1895] 2 Q. B. 203.

(10) 13 Q. B. D. 377, at p. 381.

(11) [1901] 1 K. B. 177.

bets pure and simple. Under the second part of sect. 1 of the *K. B. Div.* Act there must be (a) a game, (b) a deposit of money, (c) a con- 1916.
tingency, and (d) a sum of money or value to be promised on the FORTE
happening of a future event. All these conditions, on the facts, v.
are fulfilled here. The English Courts in *Peers v. Caldwell* (1) and *M'ALISTER.*
in *R. v. Caldwell* (2) take the correct view of the law. A machine
where the player if successful only gets back his money would not
be within the Act, as there the transaction would not be a bet.
[Counsel also referred to Halsbury, Laws of England, vol. xv,
p. 297, and *Fielding v. Turner* (3).]

T. W. Brown, in reply.

Cur. adv. vult.

SIR JAMES H. M. CAMPBELL C.J.:—

This case, though of comparative insignificance in itself, raises
a difficult and interesting question as to the scope and effect of
sect. 1 of the Betting Act, 1853 (16 & 17 Vict. c. 119). It has
already been the subject of a remarkable cleavage of judicial
opinion between the Courts of England and Scotland, in the
matter of a "Clown Automatic Machine," which is practically
identical with the machine with which we have to deal in the
present case; and even in the case of the English decisions the
judgments have not been unanimous, and the dissenting
judgment of Lush J. is in accordance with the view adopted by
the Courts in Scotland.

It will be necessary to read the precise words of the section,
but the preamble to the Act is also deserving of consideration;
for although it has been repealed by the Statute Law Revision
Act, 55 & 56 Vict. c. 19, it can still be referred to for the purpose
of the construction of the Act itself. "The preamble is to be con-
sidered, for it is the key to open the meaning of the makers of the
Act, and the mischief which they intended to remedy"—Coke's
Institutes, Part IV, cap. 74, p. 330. It reads as follows:—"Whereas
a kind of gaming has of late sprung up, leading to the injury and
demoralization of improvident persons by the opening of places
called betting-houses or offices, and the receiving of money in

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(1) [1916] 1 K. B. 371. (2) [1917] T. L. R. 231; [1917] W. N. 85;
12 Cr. App. R. 210. (3) [1903] 1 K. B. 867.

K. B. Div. advance by the owners or occupiers of such houses or offices or by
 1917. other persons acting on their behalf, on their promises to pay
 FORTE money on events of horse races or like contingencies." It ends
 v. there, and sect. 1, upon which the decision of this question in this
 M'ALISTER. case must depend, provides that—"No house, office, room, or other
 place shall be opened, kept, or used for the purpose of the owner,
 occupier, or keeper thereof, or any person using the same, or any
 person procured or employed by or acting for or on behalf of such
 owner, or occupier, or keeper, or person using the same, or of any
 person having the care or management, or in any manner conduct-
 ing the business thereof, betting with persons resorting thereto;
 or for the purpose of any money or valuable thing being received
 by or on behalf of such owner, occupier, keeper, or person as
 aforesaid as or for the consideration, express or implied, to pay or
 give thereafter any money or valuable thing on any event or
 contingency of or relating to any horse race, or other race, fight,
 game, sport, or exercise, or as or for the consideration for securing
 the paying or giving by some other person of any money or
 valuable thing on any such event or contingency as aforesaid;
 and every house, office, room, or other place opened, kept, or used
 for the purposes aforesaid, or any of them, is hereby declared to be
 a common nuisance and contrary to law."

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In the present case the appellant was the owner or occupier of premises in Victoria Street, Belfast, used by him as an ice-cream shop, as well as for the purpose of keeping thereon a "Clown Automatic Machine." By ingenious mechanism this machine can be put in motion by inserting a penny in a slot at the right hand top-corner, and then by the use of a small handle or lever a small ball is released, which travels within the machine until it drops in the vicinity of the clown, who holds in his hand a cap shaped like a cup. By the dexterous use of a second handle or lever the clown can be made to receive the ball in the cup, and if he does so a card or disc is released, which upon being presented to the man in charge of the shop can be exchanged for chocolates, or sweets in some form, to the value presumably of twopence. Upon the facts stated in the case it appears that upon the occasion complained of about a dozen boys, of the average age of fifteen years, were playing at this game, and occasionally, the clown, as manipulated

by them, caught the ball. The presiding justices were told by the crown solicitor, who appeared in support of the complaint, that the facts were identical with those stated by the magistrate in the English cases of *Peers v. Caldwell* and *Taylor v. Caldwell* (1), and that they were, therefore, bound in law to follow and adopt these decisions, while Mr. Brown, who was counsel for the defendant, submitted, upon the other hand, that upon the facts the case did not come within section 1 at all, and also that the English authorities referred to were wrong in point of law; but the justices held, in circumstances to which I must later on more fully refer, that they were bound, as a matter of law, by these English decisions, and accordingly convicted the defendant.

There has already been considerable litigation over this "Clown" machine, or rather over machines whose mechanism was practically similar, but, so far as we can judge from the authorities cited before us, no trace can be found of any attempt to apply to them the provisions of section 1 of the Betting Act, 1853, until the occasion, last year, of the prosecutions in *Peers v. Caldwell* and *Taylor v. Caldwell* (1), which afterwards came up for consideration by the English King's Bench Division, that is to say more than sixty years subsequent to the passing of the Act of 1853. Before these cases all prosecutions against persons in connexion with this machine seem to have been brought under the Gaming Act; and certainly if the transactions were all capable, as is now contended, of being swept into the net of the Betting Act, much money and much argument have been wasted in these sixty years in proceedings under the Gaming Act. The reason for this change of tactics is to be found in the fact that by continuous development the mechanism of the machine was so altered as to make it reasonable for any Court to find that it had become a game of skill, and one in which the element of chance no longer predominated, and, therefore, to eliminate it from the operation of the Gaming Act. Finally, in the case of *Pessers v. Catt* (2) it was held by the Court of Appeal, upon the facts before them, that this game, played with this particular type of machine, was a game of skill, and that accordingly a contract in reference to it was not void for illegality (3). This decision was

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(1) [1916] 1 K. B. 371.

(2) 77 J. P. 429.

(3) But see *Donaghy v. Walsh*, [1914] 2 I. R. 261.

K. B. Div. a serious obstacle in the way of any further prosecutions under the Gaming Act, and the police authorities then tried to deal with the machine under the Betting Act (1).

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Before attempting to examine the decisions in the English and Scotch Courts occasioned by this departure in procedure, I desire to call attention to a few, amongst many, of the more important decisions as to the purpose and purview of this Act. In the first place, I will refer to the case of *Bond v. Plumb* (2), in which the judgment of Lord Coleridge C.J. makes it perfectly clear that sect. 1 of the Act deals with two separate subject-matters, each of which is constituted an offence, that is to say, opening, keeping, or using any house, &c., for the purpose of persons resorting thereto in order to bet; and second, keeping, &c., any house for the purpose that persons resorting thereto should pay in advance any money or valuable thing in consideration of a promise to pay them any money or valuable thing on any event or contingency relating to horse-racing, &c. If we are to be guided by the words of the preamble, it would seem plain that at least the primary and main purpose of this section was, first, to hit at the evils of ordinary betting-houses, and, second, to prohibit the keeping of ready-money houses where bets were made in advance dependent on the event of horse races and like contingencies. In *Bows v. Fenwick* (3), at p. 345, Mr. Justice Brett says:—"When the Act of Parliament in question passed, the Legislature had not made up its mind to prohibit gaming altogether, but what it did mean to prohibit was that which is described in the preamble." In *Haigh v. Town Council of Sheffield* (4), Mr. Justice Blackburn quotes with approval the above passage, and adds these important words (at p. 106):—"While it is quite plain that the latter part of sect. 1 is confined to the kind of betting mentioned in the

(1) The "Clown" machine in the present case by its mechanism eliminated two matters which the Court in *Donaghy v. Walsh* ([1914] 2 I. R. 261) considered elements of chance, namely, (a) the trigger by which the player shot the ball into play, and (b) the checks which limited the lateral movement of the cup. [REF.]

(2) [1894] 1 Q. B. 169, at pp. 172, 173.

(3) L. R. 9 C. P. 339.

(4) L. R. 10 Q. B. 102, at p. 106.

preamble, I think it is not so clear that the first part of the section may extend further." And, in the same case Mr. Justice Lush says, after reading the preamble:—"It seems clear from this that the Legislature had no intention of interfering with the ordinary practice of betting and wagering. The statute was intended to deal with a more degenerate form of gambling and one of a more demoralizing character. The words of the enacting part go beyond the words of the preamble, not for the purpose of extending the operation of the Act, but for the better carrying out the object intended and reaching every kind of evasion which otherwise might have been attempted." In the well-known case of *Carlill v. Carbolic Smoke Ball Co.* (1), the defendants, who had promised by advertisement £100 to any person who contracted influenza after having used, under the prescribed conditions, one of their smoke-balls, tried to resist a claim by the plaintiff for the £100 by the plea that the contract, if any, was by way of gaming and wagering. Mr. Justice Hawkins, in over-ruling this contention, thus defines a bet:—"A wagering contract is one by which two persons professing to hold opposite views touching the issue of a future uncertain event, mutually agree that, dependent upon the termination of that event, one shall win from the other and that other shall pay or hand over to him, a sum of money or other stake, neither of the contracting parties having any other interest in that contract than the sum or stake he will so win or lose, there being no other real consideration for the making of such contract by either of the parties." This scientific definition by an eminent legal expert has frequently been relied on in subsequent cases, and has never, so far as I can find, been assailed, and if it is accurate, it seems to me to dispose of the case before us, on the assumption that sect. 1 of the Betting Act, in both its parts, deals only with betting or wagering, because it is impossible to bring within it such a transaction as we have to investigate in which the boys had a further interest in the deposit of their penny, namely, the right to manipulate the machine, and in which, to a greater or less degree in each individual case, the consideration of sport and the exercise of skill entered in addition to the desire to win a bar of chocolate.

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Caminada v. Hulton (1) was a case of a weekly newspaper, the *Racing Record*, which contained ordinary racing intelligence and also a coupon, which any purchaser might cut off, and, having placed upon it the names of the horses which he thought would win six specified races, might send to the proprietor's office. The proprietor offered prizes to the persons who selected six, five, or four winners, the prizes varying in amount according to the number of winners selected. It was held that the facts did not bring the case within the first part of sect. 1 of the Betting Act, as the consideration for which the purchaser of the newspaper paid his money was the newspaper itself. In *Downes v. Johnson* (2) it was sought to apply the provisions of this section to a proprietary club, the Albert Club, the members of which, though using it in other respects as a social club, admittedly resorted to it for the purpose of making bets with one another upon the events of horse races.

It was held by the Court, affirming the dismissal of the complaint by the magistrates, that the case did not come within the section, Mr. Justice Grantham stating (at p. 207):—"In my opinion, we have no right to stretch the law so far as to make an Act of Parliament cover cases to which it cannot have been intended to extend. Some light is thrown on the object and intention of the Act by the words of the preamble." He then quotes the preamble and proceeds: "These words seem to me to make it clear that the Act is aimed at houses and offices kept by persons who receive money from improvident persons, who come in and pay money in order to back horses. The fact that, in this case, other members of the club go there and bet and the respondent bets with them can give us no right to strain an Act of Parliament which was provided for a different purpose, so as to make it apply to a case like the present." In *Reg. v. Hobbs* (3) the Court for Crown Cases Reserved held that the defendant was not, in the following circumstances, guilty of the offence under the latter portion of sect. 1 of the Betting Act. He had on the occasion complained of, as in former years, a Derby sweepstake, the tickets being issued upon his premises to subscribers, and the amount

(1) 60 L. J. (M. C.) 116.

(3) [1898] 2 Q. B. 647.

(2) [1895] 2 Q. B. 203.

subscribed, less a deduction of 10 per cent. for expenses, distributed by him in prizes under prescribed conditions. Lord Russell, in delivering the unanimous judgment of a Court consisting of five judges, states, after a critical examination of the preamble and section, that the Act was not intended to deal with transactions of the kind, but with betting pure and simple. Upon the other hand, Serjeant M'Sweeny, in his able argument in support of the conviction in the case now before this Court, strongly relied upon the authority of *Reg. v. Stoddart* (1), in which Lord Alverstone, upon facts practically identical with those in *Caminada v. Hulton* (2), held that the transaction fulfilled the conditions of a bet, and that the defendant, who had been convicted by the jury upon the direction of Mr. Justice Channell, under an indictment framed under sect. 1 of the Betting Act, had been rightly convicted. If it is impossible, as I think it is, reasonably to reconcile the decision in this case with the cases of *Caminada v. Hulton* (2), *Carlill v. Carbolic Smoke Ball Co.* (3), *Reg. v. Hobbs* (4), and the others to which I have referred, I am prepared to adopt the reasoning in these latter cases, upon the broad grounds that transactions of this kind are not either betting or gaming within the meaning and intention of the Betting Act. If the question of the application of sect. 1 of that Act to the "Clown Automatic Machine" was coming up now for decision for the first time in the High Court, I would be content to rest my judgment here; but as the precise question has been already twice considered by the Courts in England, and at least once in Scotland, I am bound to review these decisions.

The first of these cases in point of date are *Peers v. Caldwell* (5) and *Taylor v. Caldwell* (5), decided last year by the King's Bench Division in England. The magistrate who had convicted sets out, in the case stated by him, the nature and mechanism of this clown machine, and mentions that the lads who were playing at the machine paid a halfpenny for each trial, and, if successful in catching the ball in the clown's cap, received a card or disc which they exchanged for sweets, presumably of the value of twopence.

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(1) [1901] 1 K. B. 177.

(2) 60 L. J. (M. C.) 116.

(3) [1892] 2 Q. B. 484, at p. 491.

(4) [1898] 2 Q. B. 647.

(5) [1916] 1 K. B. 371.

K. B. Dir. He further states that they were successful, on the average, once in eight trials; or, in other words, that each twopennyworth of sweets cost the lads on the average four pence. He further states

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"We will assume," he states, "that it is a game of skill. The fact of there being a possibility of exhibiting some degree of skill in playing with this machine does not, in my opinion, affect the question of liability of the appellants. To my mind, the boys were not exercising skill. They were thinking only of the sweets." Mr. Justice Avory appears even in a more direct way to base his judgment on a similar inference or assumption, for he says (at p. 379): "I agree with Mr. Gordon Hewat that the test is, what was the consideration for the halfpenny? If it was clear that these boys paid their halfpennies as entrance-fees for the purpose of entitling them to take part in a game of skill, the transaction would not constitute an offence under the second branch of the section. On the other hand, if the consideration for the halfpenny was solely (2) the promise of the appellants to give the players twopennyworth of sweets if the ball fell into the clown's cap, it is equally clear that the transaction did constitute such offence. To my mind it was plainly open to the magistrate, notwithstanding that he came to the conclusion that he was bound by the decision of the Court of Appeal to treat the game as one of skill, to hold that the latter was the true consideration. For myself, I do not for one moment believe that the boys were paying their halfpennies for the privilege of competing in a game of

(1) 77 J. P. 429.

(2) A correction of this report has appeared in the Weekly Notes (1917, p. 198) since this judgment was delivered.—Ed.

skill. They were simply gambling on the strength of getting twopennyworth of sweets, and that, in my opinion, is what the magistrate intended to find."

This is certainly, in my view, a remarkable instance of judicial thought-reading; and, with all respect for the great experience of Avory J. in such cases, I cannot find in the case stated the materials for such an inference; and, in view of the fact that each twopennyworth of sweets cost the players, on the average, fourpence, I should myself have inferred that some additional element, such as the pleasure of the game, materially influenced them. But if the learned judge is right that the true test, in such cases, is what was the consideration for the halfpenny, I should have thought that there should have been either an express finding of fact by the magistrate that the sole consideration was the promise of the sweets, or at least some indication by him that this test was present to his mind and duly considered. I cannot think that this Court, upon a case stated, is at liberty to supply, by an inference of its own as to the intention of the magistrate, the essential finding of fact upon which the guilt or innocence of the accused is made to depend. I regard the test itself as unsound and impracticable, as it makes the guilt or innocence of the owner or occupier of the premises to depend, not upon his own acts or even his own intentions, nor yet upon the acts of the persons resorting to his premises, but upon the inference to be drawn as to the motive of the persons so resorting. If, in this appeal before us, I thought I was at liberty to determine the motive of the lads, I should hesitate before deciding that it was solely a desire for sweets, in view of the evidence given by one of them, who was called as a witness for the prosecution, but states in cross-examination:—"I spent twopence, and got twopence worth. It is great sport working this machine. You have to have your wits about you to catch the ball." I have no doubt that the youngsters had their minds on the sweets, in the sense and to the extent to which their seniors, in the game of "bridge," or in other games, in which there is at least some element of skill, and in which there is a tournament or competition for prizes, which are given in consideration of the payment by the competitors of their entrance fees, have their minds, to a greater or less degree, upon

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This test was characterized by the Lord Justice-General of Scotland as an absurd one in the case of *Mackintosh v. Granata* (1), which was decided, in reference to the same machine, by the High Court of Judiciary shortly after the decision in *Peers v. Caldwell* (2) and *Taylor v. Caldwell* (2), that is to say in July, 1916, and which agreed with the dissenting judgment of Mr. Justice Lush in these cases. The case is reported in the Scotch Law Times Reports, 1916, vol. ii, part 10, where the judgments can be found, and it is sufficient for present purposes to say that the Court quashed the conviction, holding, in accordance with *R. v. Hobbs* (3), that the Betting Act dealt with betting and wagering pure and simple, and that the transaction was not in its nature a "bet" within the meaning of that Act. If the true test, as held by the majority of the judges in *Peers v. Caldwell* (2) and *Taylor v. Caldwell* (2), is the consideration for which the lads paid their pennies, then it suffices for the determination of the case before us, because I am perfectly satisfied that the magistrates never had such a test present to their minds at all, and never considered it. What happened in the case is plain as described by themselves. They considered, as contended by the prosecutor, that they were bound by the decision of the English Court in *Peers v. Caldwell* (2) and *Taylor v. Caldwell* (2), not merely as to the law of the case, but also as to the inferences to be drawn from the facts. In this they were entirely wrong, as it was their duty to draw their own inference from the facts, and to find as a fact what was the consideration for the payment of the halfpenny. In the case of *Bracchi v. Rees* (4), which was also a prosecution in reference to the same machine, the magistrates had it before them and tested it for themselves, and notwithstanding the previous decision of the Court of Appeal in England in *Pessers v. Catt* (5), that the game was one of skill, they found it to be in fact a game of chance, and upon a case stated it was held that they were within their right, as they were only bound

(1) 53 Scots. L. R. 766.

(4) 79 J. P. 479.

(2) [1916] 1 K. B. 371.

(5) 77 J. P. 429.

(3) [1896] 2 Q. B. 647.

on matters of law and not on questions of fact. When this case came up originally before this Court it was not constituted as at present, and upon that occasion it was sent back to the magistrates to answer seven questions of fact, one of which was this very question as to the consideration for the payment of the halfpenny. Though directed by the order of the Court to enter continuances, they returned the questions with their answers, stating at the same time that none of these seven questions had been raised before them. They did not for the purpose of answering these questions re-hear the case or give the parties an opportunity of either arguing them or giving further evidence upon them, and I wish to state emphatically for myself that on all such occasions, where the case stated is returned to the magistrates for further findings of fact, it is their duty, unless otherwise directed by the order of the Court, to give the parties an opportunity of being heard and, if they wish, of tendering further evidence. See *Rex v. Bloxham* (1). I certainly decline to act upon answers, given in February, 1917, merely from recollection of what transpired before them in February, 1916, especially if such answers are to be made the test of the guilt or innocence of the defendant upon a criminal charge.

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There remain to be dealt with the latest cases on the subject: *Rex v. Peers* (2) and *Rex v. Brown* (2), decided by the Court of Criminal Appeal in England, consisting of Lord Reading C.J., Mr. Justice Bailhache, and Mr. Justice Low, on which the same question arose upon facts substantially identical with those in the former English cases and the case now before this Court. The case has not as yet appeared in the authorized reports, but a report of it will be found in the "Weekly Notes," March 10th, 1917 (3). Lord Reading, who delivered the unanimous judgment of the Court, while following and adopting the decision in the previous English cases of *Peers v. Caldwell* (4) and *Taylor v. Caldwell* (4) seems to me to have completely rejected the grounds of these decisions. I have already pointed out that in these cases Mr. Justice Ridley apparently bases his decision upon an

(1) 1 A. & E. 386.

(2) [1917] T. L. R. 231; [1917]

W. N. 85; 12 Cr. App. R. 210.

(3) But see 12 Cr. App. R. 210.

(4) [1916] 1 K. B. 371.

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inference of fact drawn by himself, but not to be found in the case stated, "that the boys were not exercising skill. They were thinking only of the sweets." Lord Reading, in reference to this, states that (1917, W. N., at p. 86):—"It is true that Ridley J. went on to say, 'to my mind the boys were not exercising skill, they were thinking only of the sweets'; but that observation did not form part of his decision." I find myself unable to adopt this version of the judgment of Ridley J., or to read it in any other sense than founded upon his inference that the boys were not exercising skill, but were thinking only of the sweets, and it is worth noting in this connexion that Lord Reading abstains from any comment on the judgment of Mr. Justice Ivory, who, beyond all doubt, based his entire judgment upon the same inference, as will be seen from the quotations I have given from it, concluding with the following words:—"For myself, I do not for one moment believe that the boys were paying their halfpennies for the privilege of competing in a game of skill. They were simply gambling on the strength of getting twopennyworth of sweets, and that, in my opinion, is what the magistrate intended to find."

Lord Reading having plainly rejected this consideration as the test of liability, appears, from the report, to propound another and wholly different test, namely:—"Was the money deposited upon the promise to pay any money or valuable thing in a certain event or contingency?"

This test has not only the advantage of literal compliance with the language of sect. 1, but it also makes the guilt of the proprietor depend upon the purpose for which he kept the premises for the use of the persons resorting thereto, and not upon any inference to be drawn as to the motive of the persons themselves. But it will be found, upon closer examination, necessarily to include very many cases which it is impossible to believe the Legislature ever intended to include within it. It would include all golf clubs, billiard saloons, shooting galleries, &c., which are in the habit of using the premises for competitions in which prizes are offered to competitors in consideration of the payment in advance of their entrance fees. Even the booth in the fair or on the racecourse used for the purpose of "Aunt Sally" must be hit by it, because in it, as in the other cases, the consideration for the

payment by the proprietor of the prizes or the cocoanut is the payment in advance of a sum of money by the players, and all such premises so used come within the concluding words of sect. 1, "as a common nuisance and contrary to law." It would even embrace those numerous cases of automatic machines to be found on all our pier pavilions, in which the player who successfully manipulates the machine gets back nothing but the penny he has inserted in the slot. In such a case the proprietor always stands to win, as the failures will outnumber the successes; but the player can never get anything, as the best he can hope for is the return of his penny; yet such a transaction is in its very essence inconsistent with any notion of a bet or wager, in which the successful party always wins something over and above his own stake. I asked Serjeant M'Sweeny, in the course of his argument, whether if this machine kept upon the premises in the present case had been of the kind to which I have referred, namely, one in which the successful operator only got back in return an equivalent to the value of the stake, the proprietor would be guilty of an offence, and his reply was in the negative, upon the ground, as stated by him, that such a transaction essentially differed from a "bet," in which the winner always received something over and above the value of his stake; and yet it is plain that every such game comes directly within the test suggested by Lord Reading. Applying to such a case the test, which, as I construe them, is the ratio decidendi in the judgments of Ridley J. and Ivory J., the proprietor has a loophole of escape if the magistrates find as a fact that the competitors paid their entrance fees for the purpose of exercising their skill; but I can see no avenue of escape for him under the test formulated by Lord Reading, and if logic compels the admission that under this test these cases come within the literal language of the section, common sense revolts against their inclusion.

The truth is that any test which can be suggested for the purpose of applying sect. 1 to any such transactions into which the personal skill of the players must, more or less, contribute to his success, inevitably leads to palpable injustice and absurdity. The conviction must be quashed, with costs to the appellant of all proceedings in this Court.

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K. B. Div. I only wish to add that we have nothing to do with any
 1917. consideration as to the moral effect upon the character of young
FORTE lads of indulgence in pastimes of this kind; but only to decide
v. whether, being bound to give this as well as every other penal
M'ALISTER. statute a strict construction, we can extend it to a case like the
Sir James H. present. Further, we have no concern with the question whether
M. Campbell the facts before us disclose any offence under the Gaming Act, as
C.J. that question is not open upon this appeal.

MADDEN J. and GORDON J. concurred.

Solicitor for the appellant: *John Graham.*

Solicitor for the respondent: *Henry A. Wynne (Chief Crown Solicitor).*

C. N. K.

K. B. Div. THE OWNERS, MASTER, AND CREW OF THE STEAM
 1916. TRAWLER "RAMBLER" OF LIVERPOOL, PLAINTIFFS, *v.*
Jan. 27, 28, THE OWNERS OF THE NORWEGIAN BARQUE "KOTKA,"
 31. THE CARGO, AND FREIGHT, DEFENDANTS (1).
Appeal.
 1916. *Admiralty—Salvage—Amount—Submarine Peril—Apprehended Danger of*
June 27, 28. *Submarine Attack—Removal of derelict vessel from Trade Route—*
Nautical Assessor in Court of Appeal—Remuneration of Assessor.

Where salvage services were rendered by one vessel to another in circumstances where the danger of attack by an enemy submarine might have been reasonably apprehended, although no such attack in fact ensued,

Held, that the danger incurred was one of the circumstances to be taken into consideration in assessing the amount of the salvage award.

Semle (per Ronan L.J.): The public service rendered by the removal of a derelict vessel from a trade route is another of such circumstances.

Remuneration at the rate of five guineas per diem will be allowed to a nautical assessor sitting in the Court of Appeal.

This was an action claiming salvage.

The "Rambler" was a single-screw steamer 105 feet long, fitted with engines of 50 horse-power nominal, and 360 indicated horse-power; her value being admitted to be £4500. She carried

(1) In the Court of Appeal, before SIR I. J. O'BRIEN C., and
 RONAN and MOLONY L.JJ.

a crew of eleven hands all told. The "Kotka" was an iron barque of 952 tons register, 152 feet long, and of the admitted value of £1100, the value of her cargo, which consisted of timber, being £5000.

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On the 27th June, 1915, the "Rambler" sailed from Liverpool and proceeded to the trawling ground off the south-west coast of Ireland, and on the 29th June she was engaged in trawling in a position thirty miles west by south of the Fastnet light. At about 8 o'clock on the evening of the latter day the "Rambler" sighted a Norwegian vessel, the "Abyssinia," picking up the boats and crew of a vessel not then in sight, but which was subsequently ascertained to have been the "Kotka," which had been attacked by a German submarine, riddled with shell-fire, and abandoned by her crew, whilst proceeding on a voyage from the United States to Cork. On the 30th June the "Rambler" steamed for fifty miles in an E.S.E. direction without fishing, the weather being very thick, with rain, mist, and fog, and a considerable sea, which conditions prevailed until the 3rd July. On the early morning of the latter day, when in a position about thirty miles S.S.W. of Galley Head, the "Rambler" sighted the "Kotka" four or five miles distant. She was derelict; there was a fresh breeze with a heavy ocean swell from the westward, and the seas were breaking over her. The "Rambler," which was then fishing, hauled up her trawl, and proceeded to the "Kotka." The latter was found to be water-logged, with a heavy list to port. Several attempts were then made to board the "Kotka," but these failed owing to the rough sea. The "Rambler" stood by until 11 a.m., when, as the weather had moderated slightly, a second attempt was made to board the "Kotka," which succeeded, but the sea was still too rough to establish a connexion between the vessels. A third attempt was made at 5.30, when the crew of the "Rambler" succeeded in attaching two trawling warps to the "Kotka's" hawser, and they started to tow the "Kotka" stern foremost to Queenstown at 7.45 p.m. When some miles distant from the Old Head of Kinsale, on the morning of the 4th July, the "Rambler" was given assistance in towing the "Kotka" by a Government patrol boat, the weather having by then abated, and further assistance was afterwards given by a Government tug. The "Kotka"

K. B. Div. was brought safely into Queenstown Harbour on the evening of the 4th July.

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Evidence was given at the trial that the value of the fish on board the "Rambler" was deteriorated to the amount of £50, and that she lost three days' fishing at a loss of £20 a day. She had also damaged her hawsers.

Boyd J., with the concurrence of a nautical assessor, assessed the award to the "Rambler" for the services rendered at £2500, distributed as to £1500 to the owners, and as to £1000 to the crew. The learned judge in his report stated, "Captain Webb (my assessor) and I agreed that the fact of the presence of German submarines in the locality, as demonstrated by the fate of the "Kotka," greatly increased the peril incurred by the "Rambler" and her crew in remaining in the locality and effecting the salvage services. We considered that they displayed great heroism and bravery in facing these perils, and in performing the salvage services." On the 27th January, 1916, the defendants applied to the Divisional Court to set aside this award.

Chambers K.C., Powell K.C., and E. M. FitzGerald, for the defendants.

FitzGibbon K.C., Hanna K.C., and Daly, for the plaintiffs.

Jan. 31.

GIBSON J. :—

Possibly, had I been sitting in the Admiralty Court, I might have estimated the salvage assessment at a lower figure; but my brother Boyd has had a life-long familiarity with the sea, and he was assisted by an assessor. We have no note of the oral judgment which he delivered. No mistake in principle is disclosed or undue weight given to any of the various elements enumerated in Lord Justice Kennedy's work. The whole argument of the appellants is that the award is excessive, and that the excess is so great that it is just and right to reduce it, counsel agreeing that it would be for this Court, if they so held, to determine the proper salvage award.

If this was a common law case, we should not have the same difficulty. The facts stated in the claim are accepted as true, and so is the oral evidence. None was given for the defendants.

But in Admiralty the judgment is largely discretionary, depending on a number of elements not separately valued, or indeed capable of money computation.

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The main grounds for attacking the judgment are that—

1. The "Rambler's" effort and skill were of no great value, a matter on which my brother Boyd and his assessor would be more competent to decide than I am.
2. That the danger of the derelict "Kotka" being entirely lost was not considerable.
3. That the submarine peril must have been grossly over-estimated.

As to the vessel, which while she held together was unsinkable, becoming a total loss, no outgoing steamer would be likely to undertake salvage. An incoming vessel might; but it appears that shortly after the "Rambler" reached Cork there was a strong wind which might have driven the "Kotka" far out of the ordinary course. The likelihood of such loss was pre-eminently a matter for the judge and his expert. No evidence was given as to the course of vessels in and out. A trawler would be most likely, if it happened to see the "Kotka," to undertake salvage.

As to the submarine peril—a novel element—no doubt the trawler remained fishing close to the "Kotka"; but the submarine which attacked the "Kotka" may have had a comrade: she was armed with guns, and if she saw the "Rambler" towing the vessel she had done her best to destroy, she might have attacked the trawler with her guns. No doubt, the time taken and the distance to be traversed were not great; but the submarine peril is not easy to value. It is to be estimated not merely by the result, or even by what the salvors might have thought at the time. There was no official evidence as to the anticipated danger.

In the case of a derelict, the assessment is usually large. It used to be one half the value of the vessel saved; but the award must be influenced by the value of that vessel. Where its value was great, the salvage award would obviously be a much less proportion. Admiralty judges have laid down that, in the public interest, salvage should be encouraged by a generous reward. Mr. FitzGibbon K.C., contended, relying on some general expres-

K. B. Div. 1916. *OWNERS OF "RAMBLER" v. OWNERS OF "KOTKA."* sions in cases in relation to other facts, that the danger to vessels from the presence of a derelict in their course was an element which ought to be considered. No such element is stated in Lord Justice Kennedy's enumeration of factors. It admits of no calculation, and would be wholly arbitrary; and I have great difficulty in seeing why or on what basis the salvaged vessel should pay for such service to the nautical public. The judgment below discards any such consideration. Had it been otherwise, I should have been inclined to think that there was an error in principle in the award.

The only instance cited where the salvage bore a small proportion to the value of a derelict was the case of the *Cleopatra's Needle* (1); but there the value was not commercial, and Sir Erasmus Wilson was acting as a public-spirited benefactor—considerations which probably account for the comparatively small salvage assessment; for giving even so much the judge adopted an apologetic attitude.

In the case of derelicts of value in the neighbourhood of £5000 half has not been uncommon.

Looking at all the factors entering into the discretionary judgment, shown by a long course of Admiralty decisions from which salvage law has been evolved, and by which it is, if not governed, at least illustrated, I might myself have given a considerably smaller sum, though I am not in such a good position to assess as the judge below with his assessor. But, even if I was to act on that view, is the proportion of difference so great as to justify reversal? Here we are confronted by several cases which appear to lay down that the excess to warrant reversal must be about one-third over the amount which the Appeal Court thinks just. In dealing with such discretionary judgment, largely dependent on individual conjecture, the rule of practice—rough though it be—may be convenient in many if not in most cases, but it can hardly be described as a rule of law. It is, however, remarkable that in none of the cases of reversal on appeal brought to our attention was the excess at a less proportion. In the case of a vessel of great value, such as £2,000,000 or £1,000,000, it would appear to me reasonable that a large disproportion, not

(1) 3 P. D. 145.

limited to one-third, might justify reduction on appeal. But, *K. B. Div.* whether that be so or not, the present is not a case of that class. 1916.
 On the whole, I am not prepared to overrule the decision below, "RAMBLER"
 where no error of principle is disclosed and the vessel salvaged was v.
 a derelict, made such by war perils. OWNERS OF
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The case cannot be dealt with as one of salvage without dangers and in ordinary conditions. The vessel might have drifted or been thrown out of the track of all passing vessels, and might have become a total loss to the owners. Nor is the possibility of storm supervening to be disregarded. The war risk is a matter which it is not easy to estimate.

I have not deemed it necessary to discuss the details of the evidence in the cases cited, which are only of value as indicating the principle of Admiralty decisions, and the nature and course of salvage assessment. The assistance given by the other vessels (which being in Government service make no claim) is not so great as to require any substantial reduction in the assessment. It is said that the crew of one have a claim, now the subject of arbitration in London. Of this we have no proof. In any case the amount awarded would be probably inconsiderable, and not so much as to justify, by way of discount or deduction, any appreciable alteration in the salvage award. It does not appear whether this factor entered, and if so, how far, into my brother Boyd's assessment. No attempt has been made to bring such claim into our Admiralty Court, and to enforce it against the ship or its proceeds.

DODD J. :—

I concur, and I only desire to add a few words to the judgment of my brother Gibson.

The principal ground of attack is that the learned judge must have given undue weight to the war risk. Much argument was addressed to us as to the inferences we should draw as regards this risk; but I wish to point out that we cannot judge of this or any other element of the assessment except upon the evidence. We have got no evidence and no figures based on the defendant's view of that risk; we have no rule or measure by which to estimate it; we must accept the estimate of the judge.

Gibson J.

K. B. Dir. We have no assessor. In one of the cases cited the Court was assisted by a nautical assessor. In the Court of first instance there were two of the Trinity Brethren; in the Court of Appeal there were two nautical assessors. The latter differed from the Trinity Brethren, upon what ground is not stated in the report of the case. The Court of Appeal adopted the opinion of the nautical assessors in preference to that of the Trinity Brethren. I cannot surmise what I would give in this case, unless I had the assistance of a nautical assessor, or unless I had proof that his advice could not affect the figure.

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It may be that the learned judge was affected by the dangers of the sea, and the danger of attack which threatens all who now go down to the sea in ships by the efforts of the enemy to destroy commerce upon the seas. If he was so affected, I do not wonder.

C. N. K.

June 27, 28.

The defendants appealed to the Court of Appeal.

Gibson K.C. and *E. M. FitzGerald* (*Powell K.C.* with them), for the appellants:—

One half of the available value of the "Kotka" and her cargo in their damaged condition has been awarded as salvage, which is the maximum amount ever awarded by the Court of Admiralty. We contend that the circumstances of the salving of the "Kotka" were not such as to warrant this award, which was wholly excessive. The weather conditions were normal, the distance of the towage short, and assistance was rendered in the salving by the Government vessels. It is clear that exaggerated importance has been attributed to the alleged submarine peril, which, if it be a matter to be considered at all, was in the circumstances here only a slight one, as evidenced by the fact that the "Rambler" was, at the time of undertaking this enterprise, engaged in fishing. She ran no greater risk by towing the "Kotka" to Queenstown.

They referred to "*The Janet Court*" (1); owners of the "*Thomas Allen*" v. *Gow* (2); "*The Accomac*" (3); "*The Craigs*" (4); "*The Port Hunter*" (5).

G. FitzGibbon K.C., *Hanna K.C.*, and *Daly* were not called upon.

(1) [1897] P. 59.

(4) 5 P. D. 186.

(2) 12 A. C. 118.

(5) [1910] P. 343.

(3) [1891] P. 349.

SIR IGNATIUS J. O'BRIEN C.:—

In this case the judge of the Admiralty Court has awarded the sum of £2500 in respect of the salvage of the "Kotka" by the "Rambler," to be distributed as to £1500 to the owners of the "Rambler," and as to £1000 to the master and the crew. The case came by way of appeal before the King's Bench Division, which for the reasons given by Gibson J. in his judgment, refused to accede to the appellants' contention, that in all the circumstances the award of £2500 was excessive and out of proportion to the services rendered. From that decision a further appeal has been taken to this Court, and it has been frankly admitted by the appellants' counsel that while it may be difficult to reverse the findings of a Court of first instance as to the amount of salvage to be awarded, unless there appears to have been some serious error in the principle of its ascertainment, that difficulty becomes greatly increased when the case comes on appeal before a third tribunal. In "*The Glengyle*" (1) Lord Herschell is reported to have said:—"My Lords, the Court of Appeal having arrived at that conclusion of refusing to disturb the award of the learned Judge of the Admiralty Court, this appeal is now before your Lordships' House, and, speaking for myself, I must say I think it would need a case exceptional and extraordinary to induce this House to interfere with an award made by the learned Judge of the Admiralty Court, and affirmed by the Court of Appeal. Unless one were to see that some of the elements which ought to have been taken into account had been overlooked, or that an altogether exaggerated importance had been given to some of the elements of the case—in short, that the principles which are recognized and settled had not been satisfactorily and truly and properly applied, I think this House would not interfere with the award." That was a case of an appeal from the Court of Appeal to the House of Lords, but the principle laid down by Lord Herschell is, I think, applicable to an appeal to this Court in a case which has already come by way of appeal from the Judge sitting in Admiralty to the King's Bench Division, and the appellants are thus, at the outset, faced with a serious difficulty.

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(1) [1898] A. C. 519.

Appeal. Now, the amount awarded in this case was practically one
 1916. half of the value of the "Kotka" and her cargo as ultimately ascer-
 OWNERS OF tained, and, as a practical working rule, one moiety of the value
 "RAMBLER," of the property salvaged is the maximum sum awarded by the
 t. Court. That being so, the appellants' counsel say that the circum-
 OWNERS OF stances and facts proved in evidence must be carefully examined
 "KOTKA." into to see whether the risks and peril encountered by the salvors,
 Sir Ignatius J. and the services rendered, were such as to entitle them to this
 O'Brien C. large reward. Before advertg to the facts proved in the present
 case I wish to cite one passage in the judgment of Dr. Lushington in
 "*The Ella Constance*" (1), where, dealing with the degree of danger
 run by the salvors in that case, he says:—"It is a case in which
 there was no immediate risk, no immediate danger, but there was a
 possible contingency that serious consequences might have ensued."
 We have, therefore, to look to the possible—not problematical or
 far-fetched—contingency that serious consequences might have
 ensued in the circumstances in which the salvage was undertaken.
 What are the facts?

The position of the two vessels was at a point somewhere south
 of the Fastnet, in the ordinary track of steamers going westward,
 and where the activity of enemy submarines had unfortunately
 been manifested. It was a situation in which the opportunity
 of sinking a British or a neutral ship was likely to present itself to
 a German submarine, and there was a natural and reasonable
 apprehension on the part of the British naval authorities with
 regard to the presence of such submarines, testified by the presence
 in the locality of patrol boats.

We are entitled then to take into consideration the fact that a
 war was in progress, that this war was being waged by the enemy
 with submarine amongst other vessels, and that this particular
 spot was one where the activity of such submarines might reason-
 ably be anticipated. The "Kotka" had in fact been shelled by
 a submarine. The "Rambler" was engaged in trawling. She
 was not hampered by any charter-party, but was free to deviate
 from her course; and she seems to have been peculiarly fitted to
 render salvage services, as she had on board a supply of hawsers
 of extra strength, and in larger quantities than would be available

(1) 33 L. J. Adm. 191, at p. 193.

on an ordinary steamer. We find her, then, in this fishing district on the 3rd July, when she fell in with the "Kotka," a water-logged derelict, which had been riddled with shot by an enemy submarine.

The weather at the time when salvage operations were attempted appears to have been bad, and the circumstances were such as to involve risk, and to necessitate the exercise of considerable skill. The "Kotka" was laden with a cargo of timber, and she carried a deck cargo of timber. She had unquestionably been attacked by an enemy ship, which had fired at her, and, as I have said, riddled her with holes. Her crew had deserted her, and she was lying then a derelict. If the wind had freshened at all, she was likely to founder, because the captain of the "Rambler" states, and he is not contradicted, that she had a heavy list, owing to the cargo having shifted, and was rolling. It is clear that if at any time during the salvage operations the wind had increased she would probably have foundered; or if she had been left a derelict, and the wind had changed its course, she would either have been driven upon the land, and become a wreck, or driven out to sea, and lost, as the chance of any other ship than the "Rambler" undertaking salvage operations would have been remote.

Apart, therefore, from the special risks arising from submarines, the salvage was undoubtedly carried out under circumstances entitling the salvors to substantial reward. What is the position of a master of a boat like this when he has to consider whether he will undertake a task of this kind? It is idle, in my judgment, to say that he should eliminate from his mind the real and serious danger and likelihood of being attacked by a submarine in that locality, while endeavouring to bring the "Kotka" into Queenstown Harbour. The facts spoke for themselves. The "Kotka" had been attacked by a submarine; there were patrol boats there, obviously for the purpose of dealing with these craft. I think that, having regard to the circumstances in which he was placed, the captain was entitled to assume that in undertaking this salvage he was risking his boat, and risking the lives of himself and of his men, owing to the possibility of submarine attack. It is impossible to judge of the risk by the result, or to

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eliminate the risk of submarine attack if in the circumstances it was a real risk; and it cannot be said that in this case the risk was a real and serious one, having regard to the locality and to what had already occurred. It is also obvious that the risk to a trawler of attack by submarine craft is very different when she is engaged in rescuing a vessel with a cargo which the enemy would be naturally very desirous to destroy, and when engaged in fishing. I am satisfied that a grave risk was run by the salvors, and that it would be an injustice to them not to give full effect to this fact in assessing the amount of the salvage award. I think that the amount of the salvage was fairly arrived at, and ought not to be disturbed. I am glad to think that the nautical assessor, of whose skilled knowledge we have had the benefit, concurs in this result.

As this is the first occasion on which a nautical assessor has sat in this Court, I wish to add that the Court has decided to allow remuneration to an assessor sitting in this Court at the rate of five guineas per diem.

RONAN L.J. :—

I agree, and I shall only add a few words. I was at first struck by the argument of Mr. Gibson, that the award here, being practically the maximum award, was not justified by the circumstances of the salvage. I think, however, that Mr. Gibson has entirely under-estimated the risk of attack by submarines which was undergone by the "Rambler," and which was a very real and serious risk. In fact, the only way in which the master of the "Rambler" could have justified to his owners the risking of the loss of the vessel, and the risking of the lives of himself and his men, would have been that he was in the hope of obtaining for them a very substantial reward for his services. It is to be remembered that this is not solely a question of private right; it is also one of public policy, which requires the encouragement of bravery and enterprise, such as was displayed by the master and crew of the "Rambler" in this case, so that valuable property may be salvaged, and that cargoes, perhaps of vital importance to the national interests, may be brought into port. I am quite unable to say that the award was excessive. I wish

to add that the public service rendered by the removal of a derelict, such as was the "Kotka," from a much-frequented trade route, is, in my judgment, one of the matters which the Court may and ought to take into consideration in assessing the amount of a salvage award.

Appeal.
1916.
OWNERS OF
"RAMBLER"
v.
OWNERS OF
"KOTKA."
Ronan L.J.

MOLONY L.J. concurred.

Solicitors for the plaintiffs: *A. H. Allen & Son.*

Solicitors for the defendants: *D. & T. FitzGerald.*

R. ST. J. C.

IN RE A DEBTOR'S SUMMONS (1).

Appeal.
1917.

Bankruptcy—Debtor Summons—Execution or enforcement of a judgment—Leave of the Court—Courts (Emergency Powers) Act, 1914 (4 & 5 Geo. 5, c. 78), sect. 1, sub-s. 1 (a). April 17, 18.

Procedure by debtor summons is not execution or enforcement of a judgment or order of any Court within the meaning of the Courts (Emergency Powers) Act, 1914, sect. 1, sub-s. 1 (a), and it is not necessary to obtain leave of the Court before issuing such a summons.

APPEAL on behalf of N., a debtor, against an order made by Mr. Justice Pim in Bankruptcy, on March 30, 1917, refusing an application by the appellant to dismiss a debtor summons on the grounds of irregularity, want of jurisdiction, and that no order had been obtained under sect. 1, sub-s. 1a, of the Courts (Emergency Powers) Act, 1914, before the issue of the said summons.

It appeared that a judgment had been obtained on July 5th, 1906, by Patrick J. O'Connor against the debtor for £318 10s., debt and costs; and that down to the month of February, 1914, no application had been made to the debtor for payment of the judgment debt. On February 11th, 1914, an order was made by the King's Bench Division giving the judgment creditor liberty to issue execution against the debtor on foot of the judgment, notwithstanding the fact that six years had elapsed since the date of the judgment. Execution was not issued. On February 28th, 1917, a debtor summons was issued at the suit of the creditor

(1) Before SIR IGNATIUS J. O'BRIEN C., and RONAN and MOLONY L.JJ.

Appeal.
1917.

In re
A DEBTOR'S
SUMMONS.

against the appellant, under sect. 30 of the Bankruptcy (Ireland) Act, 1872, claiming payment of the sum due under the judgment. No order had been obtained under sect. 1, sub-s. 1*a*, of the Courts (Emergency Powers) Act, 1914, before the issue of the summons.

J. Henry, for the appellant:—

The debt on which the debtor's summons was founded in this case is a judgment obtained so far back as 1906. Before proceedings can be taken to enforce a judgment, leave must be obtained from the Court under sect. 1, sub-s. 1 (*a*), of the Courts (Emergency Powers) Act, 1914 (4 & 5 Geo. 5, c. 78). The analogous proceeding in England under the Bankruptcy Act, 1914, is a bankruptcy notice founded on a final judgment, and under the bankruptcy practice in England leave is required before a bankruptcy notice can be served: Annual Practice, 1917 edition, pp. 1368, 1385. And I submit that there is no distinction between a bankruptcy notice in England and proceedings by debtor summons in Ireland.

The procedure by debtor summons, which was in operation in England under sect. 7 of the Bankruptcy Act, 1869, was replaced by bankruptcy notice under the Bankruptcy Act, 1883; and this is also the mode of procedure under the Consolidated Bankruptcy Statute of 1914. Sect. 30 of the Irish Bankruptcy Act, 1872, followed the English Statute of 1869, and is still in force. The policy of the Courts (Emergency Powers) Act is clearly applicable to the proceedings by debtor summons.

[Authorities referred to: *In re a Company* (1); *In re Silber* (2); *In re M'Veigh*, a bankrupt (3); *Ex parte Foster* (4); *M'Mullan v. Bradshaw* (5); *In re Cleland's Estate* (6); *In re Young* (7).]

Lynch K.C. and *J. O'Connor*, for the respondent, were not called upon.

SIR IGNATIUS J. O'BRIEN C.:—

Although the point that has arisen in this case is one of some interest, it is not of such practical importance as would at first sight appear. The procedure by debtor summons still remains in

(1) [1915] 1 Ch. 520.

(2) [1915] 2 K. B. 317.

(3) 5 L. R. Ir. 177.

(4) 22 Ch. D. 797.

(5) 50 I. L. T. R. 205.

(6) [1909] 1 I. R. 1, 19.

(7) 19 Ch. D. 124.

force in Ireland; and it has been so frequently discussed that, at this stage, it would be pedantry to give reasons for the view that this procedure is not execution or anything in the nature of execution. It is not "process" in the sense of being a process in proceedings in a suit. That has been decided in *In re M^cVeigh, a bankrupt* (1). It is not execution or enforcement of a judgment or order of any Court. Therefore it seems to me to follow clearly that it is not within the Courts (Emergency Powers) Act, 1914, sect. 1, sub-s. 1 (a). The mere issuing of a debtor summons by the Bankruptcy Court, in accordance with the rules of that Court, is not an infringement of the provisions of the statute; and once the machinery of debtor summons is set in motion, it cannot be prevented from ultimately producing the statutory result—an act of bankruptcy—unless the debtor pays or secures or compounds the demand. The object of sect. 1, sub-s. 1 (a), of the Courts (Emergency Powers) Act, 1914, is to suspend execution or enforcement of a judgment; but where the procedure adopted is not either an execution or enforcement of the judgment as such, it does not appear to me to come within the Act.

I suggested to counsel that possibly in a case where a judgment required an order of the King's Bench to renew it, the Bankruptcy Court would not issue the debtor summons until it had been proved to the officer of that Court that the debt was one on which execution could issue, the original debt having been for the time being merged in the judgment. The chief clerk in bankruptcy, whose experience of the Court extends to nearly half a century, has informed us that such has not been the practice, and that, apart from the lapse of twelve years from the date of the judgment—the point which arose in the case of *Ex parte Tynte, in re Tynte* (2)—the Court would only look to the fact that there was a good debt. There is no doubt in this case that there was a good debt due; otherwise, the debtor could have appeared in the Bankruptcy Court and disputed the existence of the debt. Accordingly, I cannot say that the analogy of the case of a judgment which under the ordinary practice cannot be the subject of execution without leave helps the appellant. I, therefore, think Mr. Justice Pim was right.

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(1) 5 L. R. Ir. 177.

(2) 15 Ch. D. 125.

Appeal.

1917.

In re
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The debtor is not, however, without his remedy, inasmuch as the rules under the Courts (Emergency Powers) Act provide that no adjudication in bankruptcy shall be made until the expiration of seven clear days after the service of the notice by the petitioning creditor; and that the debtor shall be entitled before the expiration of that period to apply to the Court to stay further proceedings, on satisfying the Court that he is entitled to relief under the Act. There is, therefore, no great hardship imposed on the debtor.

I have arrived at this conclusion without the assistance of *In re Silber* (1). There is a substantial difference between the Irish bankruptcy procedure and the English procedure. One has to be cautious in applying an English authority upon a judgment summons to proceedings in Ireland upon a debtor summons, but I entirely adopt the observations of Swinfen Eady L.J. at page 320. He says:—"In my opinion the proceeding on bankruptcy petition is not within sect. 1, sub-s. 1, but it is within sub-s. 3; and the provision made by sub-s. 3 for the Court dealing with bankruptcy petitions is exhaustive, and is the only provision in the Act dealing with bankruptcy petitions." Whether or not the framers of the Act took notice of the important fact that under the Irish statute a debtor on adjudication immediately assumes the status of a bankrupt, while in England only a receiving order is made, does not appear; but, be that as it may, sub-s. 3 does deal with both countries, and effect must be given to this view.

RONAN L.J. :—

In my opinion, this case is governed by *In re Silber* (1) and *In re a Company* (2); and these two authorities make it impossible for us to do anything but to affirm the judgment of Mr. Justice Pim.

MOLONY L.J. :—

It is well settled that procedure by debtor summons is not execution, and consequently the cases of *In re Silber* (1) and *In re a Company* (2) are authorities showing that the provisions of sect. 1, sub-s. 1 (a), of the Courts (Emergency Powers) Act, 1914, do not apply in the present case. Apart from these cases, I am of opinion that Mr. Justice Pim's decision was right.

(1) [1915] 2 K. B. 317.

(2) [1915] 1 Ch. 520.

I am glad, however, that the debtor will not be prevented by our decision from claiming the benefit of the Act, as under the provisions of Rule 6 of the Lord Chancellor's Rules if a petition in bankruptcy is, in consequence of failure to comply with the debtor summons, presented, the debtor must be given a notice in the prescribed form, and be afforded an opportunity of showing that he is entitled to relief under the Act.

Solicitors for the appellant: *O'Neill & Collins.*

Solicitor for the respondent: *C. M. Grimes.*

C. L.

Appeal.
1917.

In re
A DEBTOR'S
SUMMONS.

Molony L.J.

TOWN AND COUNTY ADVANCE COMPANY, LTD., v.
PROVINCIAL BANK OF IRELAND, LTD. (1).

K. B. Div.
1917.

April 25, 26.

Cheque—"Fictitious or non-existing" Payee—Intention of Drawer—Bills of Exchange Act, 1882 (45 & 46 Vict. c. 61), s. 7, sub-s. 3.

On the strength of what subsequently proved to be a forged promissory note, the plaintiffs sent by post a crossed cheque drawn by them in favour of M. or order for the amount of an advance. P. intercepted the cheque and brought it to the D. branch of the defendant bank, and, having endorsed it first as M. and next as P., received payment of the amount of the cheque.

In an action by the plaintiffs against the defendant bank to recover the amount of the cheque as money had and received by them to and for the use of the plaintiffs:

Held, that the payee was not "a fictitious or non-existing person" within the meaning of sect. 7, sub-s. 3, of the Bills of Exchange Act, 1882; that therefore the cheque could not be treated as payable to bearer; and that the plaintiffs were entitled to judgment.

Vinden v. Hughes, [1905] 1 K. B. 795, and *North and South Wales Bank, Ltd., v. Macbeth*, [1908] 1 K. B. 13; [1908] A. C. 137, followed and applied.

NEW TRIAL MOTION.

This action was tried before Dodd J. without a jury on 9th of February, 1917, when the learned judge gave judgment for the plaintiffs for £50 and costs. The plaintiffs' claim was for £50, money payable by the defendants to the plaintiffs for money had and received by the defendants to and for the use of the plaintiffs.

(1) Before SIR JAMES H. M. CAMPBELL C.J., and MADDEN J.

K. B. Div.
1917.
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v.
PROV. BANK.

The facts of the case, which were undisputed, were as follows :—
A man named Philip Patrick Higgins, who lived near Dungarvan, got into correspondence with the plaintiffs, who were a loan company in Newry, and in that correspondence he always signed himself as “M. P. Higgins.” In reply to his application for a loan, the plaintiffs sent him a list of questions to answer, and, in his replies to such questions, he stated that he was a bonâ fide farmer, owning three small farms in the townland of Kilgrovan, Co. Waterford, and that two of these farms were bought out; that the stock and farming implements on his farms were worth about £100; that he was married and had two young children, and that his name was Michael P. Higgins. In order to substantiate his statement that he owned the three farms, he sent to the plaintiffs two receivable orders and a rent-receipt, all bearing on their face the name of Michael Higgins. These documents all belonged to his father Michael, with whom he resided. Philip Patrick Higgins was, in fact, an unmarried man, and owned no farms either in the townland of Kilgrovan or elsewhere. There were no other persons of the surname of Higgins in the neighbourhood. As security for the intended loan the plaintiffs required a promissory note, signed by the borrower and his wife, and, accordingly, they were sent a promissory note which purported to be signed by “Michael P. Higgins, farmer, Kilgrovan, Dungarvan, Co. Waterford,” and “Anne Higgins, Kilgrovan, Dungarvan, Co. Waterford,” in the presence of “John Kelly, farmer, Clonea, Dungarvan.” All these signatures were forgeries. On receipt of this forged promissory note the plaintiffs sent, by post, to the address with which they had been corresponding a cheque, drawn on the Newry branch of the Northern Banking Company, Limited, in favour of “Mr. Michael P. Higgins or order,” and crossed generally. Philip Patrick Higgins intercepted the cheque, indorsed it first as “Michael P. Higgins,” and secondly as “Philip P. Higgins,” and cashed it across the counter of the branch of the defendants’ bank at Dungarvan.

The defendants’ defence was that the payee named in the cheque, namely, “Michael P. Higgins,” was at all material times a non-existing person, and that the cheque pursuant to the provisions of the Bills of Exchange Act, 1882 (45 & 46 Vict. c. 61),

might be treated as a cheque payable to bearer; that the cheque was negotiated to the defendants for value, and that the defendants became holders thereof for value and in due course as a cheque payable to bearer; and that the defendants as holders as aforesaid presented the cheque for payment to the Northern Banking Company, Limited, and were paid the amount of such cheque as holders thereof as aforesaid.

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The defendants moved for judgment or a new trial on the grounds that the learned judge who tried the action was wrong in law in directing himself that in fact the payee of the cheque was not a fictitious or non-existing person, within the meaning of sect. 7, sub-s. 3, of the Bills of Exchange Act, 1882, and that the finding of fact of the judge was against the evidence and without any evidence to support it.

S. L. Brown K.C. (with him *Phelps*), for the defendants:—

The payee named in this cheque was a fictitious or non-existing person within the meaning of sect. 7, sub-s. 3, of the Bills of Exchange Act, 1882 (45 & 46 Vict. c. 61), and that being so we were entitled to treat the cheque as a bearer cheque, and, therefore, the crossing of the cheque made no difference as to its negotiability: *Smith v. Union Bank of London* (1). If a cheque is drawn to the order of a fictitious or non-existing person, it may be treated as payable to bearer, although the drawer believed and intended the cheque to be payable to the order of a real person: *Clutton v. Attenborough & Son* (2); *Bank of England v. Vagliano Brothers* (3). The case of *North and South Wales Bank, Limited, v. Macbeth* (4) on which the plaintiffs relied in the Court below, does not affect the present case: see the judgment of Lord Loreburn C., at p. 140. The present case is indistinguishable on its facts from *Clutton v. Attenborough & Son* (2). *Vinden v. Hughes* (5) is clearly distinguishable from the present case. We submit that this case is governed by sect. 7, sub-s. 3, of the Act of 1882 as interpreted by *Bank of England v. Vagliano Brothers* (3) and *Clutton v. Attenborough & Son* (2).

(1) 1 Q. B. D. 31.

(2) [1897] A. C. 90.

(3) [1891] A. C. 107.

(4) [1906] 2 K. B. 718; [1908] 1 K. B. 13; [1908] A. C. 137.

(5) [1905] 1 K. B. 795.

K. B. Div. *McGonigal K.C. and T. W. Brown, for the plaintiffs:—*

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The whole question in this case hinges on what was the intention of the drawer of this cheque at the time when he drew it; if he intended that the cheque should be paid to a living and existing person, it cannot be treated as a cheque payable to bearer: *Bank of England v. Vagliano Brothers* (1), judgment of Lord Herschell, at pp. 152, 153. In this case the son induced us to send this cheque to his father, and then intercepted the letter. We intended that the man who, as we were induced to believe, was in correspondence with us, should receive payment of the cheque. That man is an existing person, namely, Michael Higgins the father. In *Vagliano Brothers' Case* (1) there was in fact no drawer at all, no one in the position of the plaintiffs in the present case. If in that case there was any drawer at all, he was the fraudulent clerk, and he did not intend Petridi & Co. to receive payment. The decision in *Clutton v. Attenborough & Son* (2) does not affect the present case: the judgment of Lord Halsbury C. is based entirely on the circumstance that in that case the drawer was in fact a non-existing person: see p. 93. He leaves the question in the present case open. In *Macbeth's Case* (3) Buckley L.J. said at p. 22: "Two different states of fact are contemplated by [sub-s. 3 of sect. 7 of the Act of 1882]—the one is that the payee is fictitious, the other that he is non-existent. Existence or non-existence of a particular person is a question of fact, not relevant to anybody's mind or intention. 'Fictitious' is different. A thing can only be fictitious relatively to some one. There can be no action without an actor, no pretence without a pretender, and no fiction without a feigner. Fiction is necessarily relative." The real meaning of the word "fictitious" in the subsection is explained by Bray J. in *Macbeth's Case* (4) at p. 726, where he says: "It seems to me that when there is a real drawer who has designated an existing person as the payee and intended that that person should be the payee, it is impossible that the payee can be fictitious." That statement of the law was adopted by Lord Loreburn C. (5).

(1) [1891] A. C. 107.

(2) [1897] A. C. 90.

(3) [1908] 1 K. B. 13.

(4) [1906] 2 K. B. 718.

(5) [1908] A. C., at p. 139.

In the present case the payee was an existing person, and there was no pretence or fiction on the part of the plaintiffs, the drawers of the cheque. They intended it to represent a real commercial transaction.

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Phelps, in reply :—

“Fictitious” and “non-existing” are widely different. Both *Macbeth's Case* (1) and *Vinden v. Hughes* (2) turn on the point that in each of these cases there was no real payee, and the respective decisions deal with the word “fictitious.” In the present case there was never any such person in existence as the “Michael P. Higgins” described by Philip Patrick Higgins in his answers to the plaintiffs’ questions. “Michael P. Higgins” never had any existence apart from the mind of the person who invented him. Philip Patrick Higgins invented a ghost. Once it is shown that the payee named in the cheque did not, in fact, exist, no question can arise as to what was the intention of the drawer: Byles on Bills, 17th ed., p. 104; *Clutton v. Attenborough & Son* (3). In that case the person who drew the cheque meant to draw it in favour of a real person, and so did the drawer in the present case. One of the tests of the existence or non-existence of the payee is: had anyone the right to get payment? There was no consideration for the cheque, as the promissory note never had any real existence. There never was any transaction between Philip Patrick Higgins, the poor-law guardian, and the firm of money-lenders in Newry.

SIR JAMES H. M. CAMPBELL C.J:—

We do not think it necessary to allow this case to stand over for consideration, because we have come to a clear conclusion. The case when opened by Mr. S. L. Brown was pressed upon us as being practically indistinguishable from *Vagliano's Case* (4) either in its facts or law; and it was presented to us by him as a case in which there was a fictitious payee within the meaning of sect. 7, sub-s. 3, of the Bills of Exchange Act, 1882.

The facts are short and undisputed. There was a man named Philip Patrick Higgins living near Dungarvan with his father, Michael Higgins, who got into correspondence with the plaintiffs,

(1) [1908] 1 K. B. 13.

(2) [1905] 1 K. B. 795.

(3) [1897] A. C., at p. 93.

(4) [1891] A. C. 107.

K. B. Div. who are a loan company in Newry, and in that correspondence he
 1917. represented himself as a person named Michael P. Higgins. In
 TOWN AND support of his claim he furnished them with documents, namely,
 COUNTY receivable orders and rent receipts, which appeared to show that
 ADVANCE CO. he was possessed of some farms near Dungarvan. These docu-
 v. ments bear on the face of them the name Michael Higgins, not
 PROV. BANK. Michael P. Higgins; but the plaintiffs do not seem to have
 Sir James H. noticed this, and after considerable correspondence they agreed
 M. Campbell with Philip Patrick Higgins, in the belief that his true name was
 C.J. Michael P. Higgins, to make an advance on the security of a
 promissory note signed by the borrower and his wife. They
 received a promissory note which purported to be signed by
 Michael P. Higgins and Anne Higgins in the presence of one
 John Kelly. It is common case that everything connected with
 that note was a forgery. On the strength of the documents which
 I have mentioned, and of course on the strength of this promissory
 note, the plaintiffs agreed to lend £50; and accordingly they
 sent a cheque for the amount, less an agreed deduction, to the
 address with which they had been corresponding. The payee
 named in the cheque is Michael P. Higgins. Philip Patrick
 Higgins having intercepted the cheque when it came to the house
 where he lived with his father, brought it to the branch of the
 Provincial Bank of Ireland at Dungarvan, having indorsed it,
 first as "Michael P. Higgins," and next as "Philip P. Higgins";
 and on the strength of these two indorsements the bank paid him
 the amount. The Provincial Bank negotiated the cheque in good
 faith and in the ordinary course of business, and the question for
 us to determine is which of two innocent parties is to suffer.

In support of the defendants' case we were referred to sub-s. 3
 of sect. 7 of the Bills of Exchange Act, 1882, which says:—
 "Where the payee is a fictitious or non-existing person the bill
 may be treated as payable to bearer." In *Vagliano's Case* (1) the
 question came up in the House of Lords as to whether that Act
 made any change in the pre-existing law. In that case it was
 argued on behalf of the Bank of England that, inasmuch as the
 Act was a codifying Act, sect. 7 did not extend the law as pre-
 viously existing. The House of Lords did not accept that view,

(1) [1891] A. C. 107.

and the law must now be taken to have been altered by that section, which applies whether the drawer was or was not aware that the payee was a fictitious or non-existing person.

Mr. S. L. Brown argued that *Vagliano's Case* (1) decided the present case, but the very concise and able argument which we have heard from Mr. M'Gonigal has satisfied us that the decision in that case does not apply to the facts before us.

The subsequent cases seem to establish this, that in order to have a fictitious payee within the meaning of the section you must always find that the drawer knew and intended that the payee was to be an unreality, but that if his intention was to have a real payee and a real transaction, there cannot be a fictitious payee so far as the drawer is concerned.

I adopt and follow the decision of Warrington J. in *Vinden v. Hughes* (2), and more particularly the judgment of Buckley L.J. in *Macbeth's Case* (3) at p. 22, from which it would follow that the question of a "fictitious person" cannot arise in the case before us because the drawer intended the cheque to be for a real payee, and it represented a bona fide and real commercial transaction upon his part. Mr. S. L. Brown did not argue or press upon us the point about a "non-existing payee," and during the course of the argument for the plaintiffs Mr. Phelps intervened and informed us that the defendants never contended that the payee was a "fictitious" person, but that they had in their defence confined themselves to the plea that "the payee named in the said cheque, viz., Michael P. Higgins, was at all material times a non-existing person." That gets rid of several of the matters which have been discussed before us.

There only remains the question, was the payee named in the cheque a "non-existing" person? That is a question of fact, and Dodd J., who tried the case, seems to have come to the conclusion that as a matter of fact the payee was Michael Higgins, the father of the borrower, because in his report the learned judge says that the so-called fictitious and non-existing person appeared in the witness-box before him. It was proved that Philip Patrick Higgins had before the trial of this action left his native land as a fugitive from justice. I am unable to agree with the view of

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(1) [1891] A. C. 107. (2) [1905] 1 K. B. 795. (3) [1908] 1 K. B. 13.

K. B. Div. 1917. *TOWN AND COUNTY ADVANCE CO. v. PROV. BANK.* Mr. Justice Dodd in this respect, or to hold as a question of fact that Michael Higgins, the father, was the payee; for I think that the borrower and payee was an existing person, namely, Philip Patrick Higgins, who had induced the plaintiffs to represent and describe him as Michael P. Higgins. But that did not enable him to alter and kill his identity any more than he could alter his sex by masquerading in female attire. I put several cases to Mr. Phelps in which a creditor for some purpose of his own might ask his debtor to describe him by a wrong name in a cheque, as, for instance, a person engaged in betting transactions might ask his bookmaker to draw any cheques payable to him in a wrong name. Mr. Phelps did not contend that in such a case the payee would be non-existent, but he pointed out that in the present case the consideration for the cheque was a promissory note which purported to be signed by Michael P. Higgins and two other persons. Mr. Phelps put his view of the case very neatly by saying that Philip Patrick Higgins manufactured a ghost and got a cheque made payable to that ghost.

Sir James H.
M. Campbell
C.J.

On the whole, however, I have come to the clear conclusion that the facts in evidence demonstrate that the payee named in the cheque was an existing person, namely, Philip Patrick Higgins, whose Christian name was at his request and for his fraudulent purpose innocently misdescribed by the plaintiffs as "Michael P.," but that this misdescription never caused the payee to cease to exist or become a non-existing person, and that from the first to the last he was, in fact, and in the intention of the drawer, an existing person, namely, Philip Patrick Higgins. The motion is refused with costs.

MADDEN J. :—

I am of the same opinion. I do not think it necessary to add anything to what my Lord Chief Justice has said with reference to the authorities, but I would like to state shortly my view on the question of fact into which this case seems to me to resolve itself.

Throughout this case I have been of opinion that the question to be considered is the same as if Philip Patrick Higgins, instead of writing letters, had come into the plaintiffs' office in Newry

and by statements then and there made had induced the plaintiffs' manager to draw a cheque in his favour. The fact that he conducted the matter by correspondence makes no difference. The fact that a cheque is drawn in a wrong name does not affect the question which arises under sect. 7, sub-s. 3, of the Act, provided the cheque was drawn in favour of an existing person. It seems to me that neither the fact of misdescription nor the fact that the whole thing was obtained by fraud affects the matter to be decided under the sub-section. In my opinion the cheque was drawn in favour of the existing person with whom the plaintiffs were in correspondence, whose true name is Philip Patrick Higgins.

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Solicitor for the defendants: *John Tweedy.*

Solicitor for the plaintiffs: *William Jasper Brett.*

G. E. H.

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R. (FUTTER) v. THE JUSTICES FOR THE COUNTY
 OF CORK (1).

*Justices—Jurisdiction—Petty Sessions—Commencement of Prosecution—
 'Conviction on first Summons quashed—Second Summons based on original
 complaint—Fisheries (Ireland) Act, 1850 (13 & 14 Vict. c. 88), s. 50.*

The complaint made to the justice of an offence against sect. 16 of the Fisheries (Ireland) Act, 1869 (32 & 33 Vict. c. 92), and not the issuing of the summons, is the commencement of a prosecution under the Fisheries (Ireland) Acts. *Held* accordingly, that where the complaint was made within six months from the commission of the offence, the prosecution had been commenced within the time limited by section 50 of the Fisheries (Ireland) Act, 1850 (13 & 14 Vict. c. 88).

Beardsley v. Giddings, [1904] 1 K. B. 847, and *Brooks v. Bagshaw*, [1904] 2 K. B. 798, applied.

Held also, that since a complaint had in fact been made to the justice before he issued one summons (which had been quashed), it was immaterial whether he had or had not present to his mind the existence of such complaint at the date when he issued a second summons.

MANDAMUS.

This was an application to make absolute a conditional order that a writ of mandamus should issue directed to the Justices of Co. Cork, commanding them to enter continuances upon and proceed to hear and determine according to law a complaint entered for hearing before them on 14th of November, 1916, in which the prosecutor was complainant, and James White and Patrick Regan were defendants.

The prosecutor was the secretary and inspector to the Board of Fishery Conservators for the Cork District. In the month of April, 1916, he wrote to the Clerk of Petty Sessions for the District of Passage West, and enclosed a statement of complaint against the defendants, and requested the clerk to fill up a summons alleging an offence against section 16 of the Fisheries (Ireland) Act, 1869 (32 & 33 Vict. c. 93), directed to the defendants, and to bring it to a justice for signature. The clerk prepared a summons and brought it to Mr. Oliver S. S. Piper, J.P.,

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who signed it on 13th of April, 1916. Having filled up the summons from the information contained in the written complaint made by the prosecutor, the clerk, according to his usual practice, destroyed the latter.

The summons came on for hearing on 18th of April, 1916, when the defendants were convicted in the terms of the summons. On 28th of July, 1916, the defendant James White obtained a conditional order for a writ of certiorari to quash the conviction on the ground that the order of conviction was bad for uncertainty. The conditional order was made absolute on 6th of November, 1916 (1).

Upon the quashing of the conviction, the Petty Sessions Clerk, acting upon a letter from the prosecutor's solicitor, prepared a fresh summons against the defendants, and brought it to Mr. Oliver S. S. Piper, J.P., who signed it on 9th of November, 1916.

When this second summons came on for hearing on 14th of November, 1916, the magistrates declined to hear it on the ground that, since the alleged offence was committed on the 15th day of March, 1916, the complaint in respect of the same should have been made within six months, and they accordingly made an order of "no jurisdiction" upon the summons.

There was some dispute as to what occurred when the Petty Sessions Clerk brought the second summons to Mr. Oliver S. S. Piper, J.P., for signature; and as to whether or not the clerk informed him that he had already, in the month of April, 1916, signed a former summons against the same defendants dealing with the same alleged offence. An affidavit, sworn by Mr. Piper on 27th of January, 1917, was filed on behalf of the defendants, of which the material parts were as follows:—

"2. It is the practice in the District of Passage West for the Petty Sessions Clerk (William Dunbar) to bring me at times quite a number of summonses already drawn up for my signature, and unless specially asked by me as to any circumstances in connexion with any particular case or cases, he merely presents these summonses for my signature, without making any statement or detailing the circumstances of the different cases; and in such case or cases, it is my practice to read the summons or summonses

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(1) See p. 310, ante.

K. B. Div. and attach my signature thereto. I have signed many summonses
 1917. in this way at the request of the Petty Sessions Clerk, without
 being informed of the nature of the complaint.

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"3. In the month of November, 1916, the said William Dunbar, Petty Sessions Clerk, called upon me for the purpose of obtaining my signature to a summons against James White and Patrick Regan. He informed me that the defendants were charged with an offence under the Fisheries Acts. He also informed me that the case had been on before, and, on learning this, I inquired from him if I should be acting properly in signing the summons. He replied that I had a perfect right to do so, whereupon I signed my name to the summons, which had already been prepared.

"4. On the occasion referred to in the last preceding paragraph hereof the said William Dunbar did not inform me, and I was entirely unaware that a complaint had been made to me and that I had signed a summons in the month of April, 1916, against the said James White and Patrick Regan, relating to the offence charged in the summons signed by me in November, 1916. I had then and have now no recollection whatsoever of such a complaint being made to me or of my signing such a summons in April, 1916. I cannot say positively that I did not then sign such a summons, for I may have done so among a number of other summonses; but if the alleged complaint was made to me in the month of April, 1916, I feel certain that I would have recollected it; and I swear positively that George Futter, the relator herein, never, either in writing or verbally, made any complaint to me for the purpose of obtaining a summons against the said James White and Patrick Regan.

"5. On the occasion of my signing the said summons in November, 1916, no reference of any kind was made to the complaint alleged to have been made to me in April, 1916. I had, as aforesaid, no knowledge or recollection of the said alleged complaint; and I granted and signed the said summons in November, 1916, not in pursuance or by reason of the alleged complaint of April, 1916, but by reason of the statements made to me by the said William Dunbar as detailed in paragraph 3 of this affidavit."

William Dunbar, the Petty Sessions Clerk, made an affidavit in reply, in which he stated that on the occasion when he brought

the second summons to Mr. Piper for signature, he informed him that he had already signed a previous summons against the defendants, in which the same alleged offence was charged.

Serjeant Matheson K.C. (with him *J. M. FitzGerald*), for the prosecutor:—

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Section 50 of the Fisheries (Ireland) Act, 1850 (13 & 14 Vict. c. 88), provides that no person shall be convicted of any offence against the provisions of the Act, "unless the prosecution for the same shall be commenced within six calendar months from the time of the commission of such offence." Sect. 10, sub-s. 4, of the Petty Sessions (Ireland) Act, 1851 (14 & 15 Vict. c. 93), contains a similar provision. The complaint may be verbal: section 94 of the Fisheries (Ireland) Act, 1842 (5 & 6 Vict. c. 106).

The complaint, and not the summons, is the commencement of the proceedings: *Beardsley v. Giddings* (1), which was a case under the Sale of Food and Drugs Act, 1899 (62 & 63 Vict. c. 51). The second summons on which we are now proceeding was unquestionably out of time, but it was based on the complaint made in April, 1916. There was no second complaint. This case is similar to *Brooks v. Bagshaw* (2), another case under the Sale of Food and Drugs Act, 1899, where a summons was issued within the time limited by the Act for the institution of the prosecution and then allowed to drop, and, after the expiration of the time, a fresh summons was issued, based on the original information. There it was held that as there had been no adjudication on the merits of the first summons, a second summons could be issued on the information; and that it was immaterial that the second summons was issued after the expiration of the time limited, as the information which was the institution of the prosecution had been laid within that time. The decision in *Ex parte Fielding* (3) is to the same effect. Where a conviction by justices is afterwards quashed on certiorari, the case is to be treated as if the conviction had never been made: *Conlin v. Patterson* (4). As to what amounts to a "complaint," see *Irish Insurance Commissioners v. Trench* (5).

(1) [1904] 1 K. B. 847.

(2) [1904] 2 K. B. 798.

(3) 25 J. P. 759.

(4) [1915] 2 I. R. 169.

(5) 47 L. L. T. R. 115.

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Rearden (with him *Serjeant M'Sweeney K.C.*), for the defendants:—

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We submit that there were not merely two summonses, but two complaints, and that the second summons was based on a complaint made in November, 1916. The second summons was signed and issued by the magistrate solely on the ground of the complaint made to him in November, 1916. The letter and complaint written by the prosecutor in April, 1916, were destroyed by the Petty Sessions Clerk long before the second summons was issued. The second summons was based on particulars supplied to the Petty Sessions Clerk by the solicitor for the prosecutor. In the peculiar circumstances of this case a second complaint was necessary, because the force of the first complaint was exhausted by the destruction of the written complaint, and by the fact that the justice who signed the first summons subsequently forgot all about it.

If a summons based on a complaint made to a justice proves abortive, the person who made the original complaint must go back to the same justice and get him to issue a fresh summons: *Reg. v. Pickford* (1); *Ex parte Fielding* (2). It was the same justice who issued the second summons in the present case, but he says that when he signed the second summons in November, 1916, the fact that a complaint with reference to the alleged offence had been made to him in the previous April when he issued the original summons was not present to his mind. A summons must be based on some complaint, and a justice who has forgotten all about a complaint is in the same position as a justice who is a stranger to the complaint. The date of the commencement of the prosecution is the date of the complaint upon which the effective summons is based. The second summons was issued by the justice upon the complaint made to him in November, 1916. There were in fact two written complaints in this case, as well as two summonses; the complaints were different, and the summonses were different, how can it then be said that the second summons was issued upon the first complaint?

FitzGerald was not called upon to reply.

(1) 25 J. P. 549.

(2) 25 J. P. 759.

The judgment of the Court was delivered by SIR JAMES CAMPBELL C.J.:—

We do not find it necessary to hear any further argument in this case. The contention in support of the cause shown against the conditional order is that inasmuch as the alleged offence took place more than six months before the commencement of the prosecution the prosecution does not lie.

It appears that in the month of April, 1916, the complainant on account of some fishing-net alleged to be illegally used or kept by the defendants sent a written complaint to the Clerk of Petty Sessions requesting him to fill up a summons which he in the ordinary course would bring to a magistrate for signature. The clerk accordingly brought a summons to the magistrate which the magistrate duly signed and issued on the 13th of April, 1916. This summons alleged that a complaint had been made to the magistrate that the defendants on the 15th of March, 1916, did unlawfully make use of or erect a fixed engine for the capture of salmon without having obtained the necessary certificate entitling them to do so. As the summons was drawn the offence was alleged in an alternative form. The case came on for hearing on the 18th of April, 1916, and the defendants were convicted. That conviction was subsequently quashed by this Court on the ground that the order of conviction was bad on its face for ambiguity, the conditional order for certiorari being made on the 28th of July, and the absolute order on the 6th of November, 1916.

Immediately after that decision the prosecutor again communicated with the Clerk of Petty Sessions, and asked him to issue a fresh summons. Apart from the fact that in the second summons the technical defects of the first summons were cured, the only difference between the two summonses was that in the second summons the offence was alleged to have been committed on the night of the 14th of March, 1916, and morning of the 15th of March, 1916.

When the second summons came on for hearing the magistrates held that they had no jurisdiction to hear it because the prosecution was too late, as it had not been commenced within six months from the date of the alleged offence. They were of opinion that the complaint made in the month of April, 1916,

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K. B. Div. had served its purpose, and no longer had any virtue in it. It is
 1917. this decision which is impeached by the present application.

R. Mr. Rearden's argument was very clearly put by him, but,
 (FUTTER) for myself, I have no doubt, having regard to the cases cited by
v. Serjeant Matheson, that we must treat the complaint made
JUSTICES OF in April, 1916, as being the commencement of the prosecution.
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 ———
Sir James Nothing which has happened subsequently has altered the fact
Campbell C.J. that the date of that complaint is the defining line in the case.
 The second summons could only have been issued by the magis-
 trate after some complaint made to him. Mr. Rearden has argued
 that in a case like the present, where the written complaint had
 been destroyed before the summons was issued, or in a case
 where the complaint was a verbal one, the date of the commence-
 ment of the prosecution may depend upon whether or not, at the
 time when the magistrate issued the summons, he remembered or
 had present to his mind the fact that a complaint had been made
 to him. Because the commencement of the prosecution is the
 date of the complaint upon which an effective summons is issued,
 and since a summons, in order to be effective, must be based on a
 complaint, a magistrate who has forgotten all about the fact that
 a complaint has been made to him is in the same position as a
 magistrate who is a stranger to the complaint, and, therefore, a
 summons issued by such magistrate is bad. Such an argument
 would lead to palpable inconvenience and uncertainty in the
 administration of justice; and, being satisfied that a complaint
 was in fact made to the magistrate prior to the issue of the first
 summons by him in April, 1916, I hold it to be quite immaterial
 whether he had or had not present to his mind the existence of
 this complaint at the date when he signed the second summons.

We must decide that the commencement of the prosecution
 was the complaint made in April, 1916, and that, therefore, the
 prosecution was commenced within the time fixed by the statute.
 The case must be sent back to the magistrates to hear and deter-
 mine the second summons according to law. The defendants
 must pay the prosecutor's costs, as it was by their request, and at
 their invitation, that the justices declined jurisdiction.

Solicitor for the prosecutor: *Henry P. F. Donegan.*

Solicitors for the defendants: *Wynne & Wynne.*

R. (CARL) v. JUSTICES OF TYRONE (1).

K. B. Div.

1917.

April 23.

*Licensing Acts—Offences—Keeping Open—Justices—Record of Conviction—
Procedure—Evidence—Indorsement of Conviction—Decision of Majority
of Justices.*

The King's Bench Division will not on an application for certiorari to quash a conviction, on the ground that the decision as recorded was not the decision of the Court, go behind the record of the conviction.

Where out of a Court consisting of five justices, one justice only is recorded as dissenting from the decision of the Court, the King's Bench Division is bound by the record, and cannot receive evidence to prove that the decision of the Court as appearing by the record is not the decision of the majority of the justices.

Quaere, whether in a licensing prosecution, where a defendant is convicted of an offence which may be indorsed, all the justices or the convicting justices only ought to determine the question of indorsement.

CERTIORARI.

Application to make absolute a conditional order of certiorari to remove into the King's Bench Division for the purpose of being quashed all and singular records of conviction of whatsoever trespasses and contempts whereof at the Petty Sessions District of Omagh, in the County of Tyrone, on the 12th day of February, 1917, Charles Urban Carl was convicted on the hearing of a summons or complaint that he being a person duly licensed to sell intoxicating liquors by retail at his licensed premises at Mountfield, in the County of Tyrone, did, at a time prohibited by law, and in a period during which such licensed premises are by law required to be closed, to wit, at 11.20 p.m. on Wednesday, the 7th day of February, 1917, unlawfully keep open such licensed premises for the sale of intoxicating liquors against the form of the statute in such case made and provided.

The grounds set forth in the conditional order (so far as the same are material) were as follows:—

1. That the said order of conviction, dated the 12th day of February, 1917, was not the decision of the Court.

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2. That the part of the sentence directing the conviction to be recorded upon the defendant's licence was not the decision of the Court.

3. That the said conviction or order was made without, and in excess of, jurisdiction.

4. That a majority of the justices trying said case expressed their disapproval of the sentence pronounced by the chairman, and recorded.

The certificate of the conviction was as follows :—

“The King at the prosecution of B. Conlin, Esq., D.I., R.I.C., Omagh, complainant.

“Charles Urban Carl, Mountfield, defendant.

“I certify that upon the hearing of a complaint (the terms of the complaint were then set forth as above) . . . an order was made on the 12th day of February, 1917, by the justices present against Charles Urban Carl of Mountfield, to the following effect, viz.:—Defendant duly convicted and ordered to pay for fine twenty shillings, and for costs one shilling, and in default of payment to be imprisoned in Londonderry jail for the period of fourteen days without hard labour, unless said sums be sooner paid, warrant not to issue for seven clear days, and, if issued, sixpence extra to be added to the costs. The conviction to be indorsed on the licence. Mr. Lynch dissents from decision.

“B. GOSSELIN, justice of said county.

“Dated this 13th day of February, 1917.”

The prosecutor also filed an affidavit made by Michael Lynch, J.P., of Omagh, one of the justices who heard the case, in which he stated (*inter alia*):—

At the conclusion of the evidence the chairman consulted the adjudicating magistrates, who were as follows:—Mr. John Gormley, Mr. George Young Smith, Patrick Morris, and himself (i.e. the said Michael Lynch), in addition to the chairman, Captain Gosselin. Three of the magistrates were for convicting the defendant, and two, Mr. Patrick Morris and himself (i.e. the said Michael Lynch), were for dismissing the complaint. The chairman then pronounced the decision of the Court, saying that a majority of the magistrates had decided to convict the defendant, and to fine him one pound. District Inspector Conlin applied to have the conviction recorded on the licence. The chairman thereupon consulted the magistrates again, and three were against having the conviction recorded on the licence,

namely, Mr. John Gormley, Mr. Patrick Morris, and himself (i.e. the said Michael Lynch). The remaining two, Mr. George Young Smith and the chairman, were for having the conviction recorded. The chairman then said the conviction would be recorded, as a majority of the convicting magistrates were for recording it. He said to the chairman that the conviction should not be recorded on the licence, as the majority of the magistrates were against recording it. The chairman said that his practice had always been to act on the decision of the majority of the convicting magistrates, and that he would do so in this case. He said to him that in his opinion he was wrong in doing so, and that it was the majority of the Court that should decide the matter. He made a protest, and asked the chairman to make a note of it on the order-book, which he agreed to do. The chairman then publicly announced that a majority of the convicting magistrates were for recording the conviction.

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The truth of the facts as set forth in this affidavit, if it could be looked at, was not disputed.

Murnaghan, for the prosecutor:—

Under sect. 21 of 37 & 38 Vict. c. 69, in the event of a conviction, it is enacted "that the Court shall declare as part of its sentence whether it will or will not cause the conviction for such offence to be recorded." Here the decision was not that of the Court, as the Resident Magistrate who presided refused to take the opinion of the two magistrates for acquittal. Of the three magistrates who were in favour of a conviction, one was in favour of not recording the conviction. The decision of two magistrates out of five was not the decision of the Court: *R. (Crowley) v. Cork JJ.* (1); *R. (Mulcahy) v. Tipperary JJ.* (2). A case stated must be signed by all the justices who take part: *Westmore v. Paine* (3); *Lord v. Lord* (4).

The record shows that objection was taken by the justices to the decision as announced by the chairman. *Ex parte Attorney-General* (5); *Re Middlesex JJ.* (6) do not apply to the facts here. It is not necessary that the dissenting justices should draw up a separate

(1) [1902] 2 I. R. 252.

(2) [1903] 2 I. R. 108.

(3) [1891] 1 Q. B. 482.

(4) 5 E. & B. 404, at p. 406.

(5) 41 J. P. 118.

(6) 41 J. P. 261.

K. B. Div. order. This course is suggested in *R. (Cusack) v. O'Connell* (1),
 1917. but it is not obligatory. The affidavits show that three justices
 R.
 (CARL) gave a decision contrary to that recorded.

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St. L. Devitt, for the justices:—

The Court is bound by the form of the order, even though a majority are against it: *R. (Cusack) v. O'Connell* (1). See to the same effect *Ex parte The Attorney-General* (2); *R. v. Justices of Middlesex* (3); Licensing Act of 1872, sect. 78; O'Connor's Justice of the Peace, pp. 772, 792.

The Licensing Act of 1872 is amended by sect. 21 of the Licensing (Ireland) Act of 1874. The conviction, the penalty, and the indorsement are all parts of the conviction. Under the Act of 1872 the indorsement was automatic unless the justices decided otherwise. The Petty Sessions Act, 1851, shows that the order of the justices is the conviction: O'Connor's Justice of the Peace, vol. i, p. 488; *R. v. Vipont* (4).

SIR JAMES CAMPBELL C.J.:—

In this case a man called Carl was proceeded against under the Licensing Acts. The offence of which he was convicted was keeping open his premises for the sale of intoxicating liquor during prohibited hours. The Court consisted of five magistrates, the resident magistrate being in the chair. Three of the magistrates were in favour of convicting, and they proceeded to convict and fine the defendant. The two magistrates who dissented from the conviction do not claim to have taken part in the discussion of the question as to whether the conviction should be indorsed on the licence. But it is alleged that one of the three magistrates in favour of convicting was not in favour of indorsing the conviction. The resident magistrate stated that he would treat the matter of indorsement as a question only for the convicting justices, and would not take any account of the view of the two magistrates, who were against any conviction.

Protest was made against this action of the chairman by one of the two dissenting magistrates, and he had his name recorded

(1) 20 L. R. 1r. 625.

(2) 41 J. P. 118.

(3) 41 J. P. 261.

(4) 2 Burr. 1163.

as dissenting. Neither of the other two made any formal protest or recorded his protest in the order-book. K. B. Div.
1917.

In the result, therefore, if all the magistrates were entitled to take part in the decision as to indorsement, the record only gives one magistrate as dissenting; but if, on the other hand, this question was one for the convicting justices only, it appears still that a majority were in favour of the indorsement. The case has been argued on two grounds. It is said that the conviction is bad. The first point of substance is, whether we can go behind the record in order to find that the conviction was not the act of the Court. We think we ought not to go behind the record. In recent years this Court has gone very far in allowing affidavits for the purpose of contradicting matters which appear regular on the record. We are not inclined to extend that practice. Here there was a Court of five, and only one appears on the record as dissenting. We are bound to accept that. That disposes of the case. But it was also argued, as a second point, that the Court should consist of the three justices in favour of convicting for the purpose of determining the question of indorsement, and that the other two justices could not take part in the decision of that question. R.
(CARL)
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TYRONE.
—
Sir James
Campbell C.J.

Under the Licensing Act of 1872 indorsement followed automatically on conviction in some cases, and in others it likewise followed unless the Court made an order that there should be no indorsement. Under the Act of 1874 there is no automatic indorsement; and if it were necessary to determine this second question, there would be much to be said for Mr. Devitt's contention that the indorsement is part of the sentence and that the question should be determined by the convicting justices only. But it is not necessary for us to decide this second question, and we are not to be understood as deciding it. From the point of view of public convenience, it would certainly not be desirable that the minority justices should have any say in the sentence. There will be no order for costs.

GORDON J. concurred.

Solicitor for the prosecutor: *F. J. O'Connor*, Omagh.

Solicitor for the justices: *The Chief Crown Solicitor*.

Appeal.

HUGHES, APPLICANT ; QUINN, RESPONDENT (1).

1917.

May 2.

Master and Servant—Workmen's Compensation—Contract of Service—Control—Expert well-sinker—Workmen's Compensation Act, 1906 (6 Ed. 7, c. 58), s. 13.

The applicant, who held himself out to the public as an expert well-sinker, entered into an agreement with the respondent to sink a well for him. All the tackle was supplied by the applicant, who during the course of the operations was in no way subject to the control of the respondent. The applicant was paid 8s. a day in addition to his board, and he employed an assistant to whom he paid 3s. a day. Having met with an accident at the work, the applicant claimed compensation. The County Court Judge found that there was no contract of service between the applicant and the respondent.

Held, that as a matter of law the Court was not bound, on the evidence, to find that the applicant was a servant of the respondent.

APPEAL from an order of the County Court Judge of Tyrone dismissing the application of the appellant for compensation under the Workmen's Compensation Act.

Bernard Hughes, the applicant for compensation, was a well-sinker, and held himself out to the public as an expert in that business. He kept bill-heads, which gave details of "prices for sinking and lining wells." In December, 1915, he was engaged by the respondent to sink a well; he was paid weekly, his remuneration being at the rate of 8s. a day, in addition to his board, which was worth 14s. a week extra; and he had to pay 3s. a day to a helper. Sometimes the applicant worked at so much per foot. On the occasion in question he supplied all the tackle; but the respondent supplied powder for blowing up the bottom of the well and paid £3 15s. to the applicant for blasting-powder which he had bought. Beyond pointing out the spot where he wanted to have the well made, the respondent exercised no control over the applicant. In his evidence the respondent said: "I had nothing to say to the work at the well, and had no control whatever."

When the well was 42 feet deep, the applicant fell to the bottom, the rope attached to the bucket in which he was

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descending having given way. His ankle and three ribs were fractured.

Appeal.
1917.

The County Court Judge dismissed the application of Hughes for compensation, holding upon the evidence that there was no contract of service between the applicant and the respondent. From that decision the applicant appealed:

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Lynch K.C. and *Maguire*, for the appellant:—

We submit that there was a contract of service between the applicant and the respondent, and that the applicant was a workman within the meaning of section 13 of the Workmen's Compensation Act, 1906. We rely on the fact that the remuneration of the applicant was fixed at so much per day. [They referred to the following authorities:—*O'Donnell v. Clare Co. Council* (1); *Clarke v. Bailieborough Co-operative Agricultural and Dairy Society* (2); *McNally v. Fitzgerald* (3); *Walker v. Crystal Palace Football Club, Limited* (4); *Moroney v. Sheehan* (5); *Lewis v. Stanbridge* (6)].

Babington, for the respondent, was not called upon.

SIR IGNATIUS J. O'BRIEN C.:—

The County Court Judge has found that there was no contract of service between the appellant and the respondent; and the only question we have to consider is whether as a matter of law he should have found the other way. Was there evidence reasonably fit for the consideration of a jury, assuming the issue was one for a jury? If there was, we cannot interfere.

The applicant for compensation was a well-sinker; he held himself out to the public as an expert in that work, and he kept bill-heads with the caption, "Prices for sinking and lining wells." It is not suggested that the supposed employer was a well-sinker, or that he knew anything about the business. The tackle and everything else required for the operations, with the exception of the powder for blasting purposes, were supplied by Hughes, who was paid weekly; and this latter fact would be a matter which

(1) 47 I. L. T. R. 41.

(2) 47 I. L. T. R. 113.

(3) 48 I. L. T. R. 4.

(4) [1910] 1 K. B. 87; 3 B. W. C. C. 53.

(5) 37 I. L. T. R. 166.

(6) 6 B. W. C. C. 568.

Appeal. the County Court Judge could take into account if he thought he
 1917. should have drawn an inference the other way. There was the
 HUGHES additional fact in support of the finding of the County Court Judge
 v. that the appellant was not bound to obey the respondent as to the
 QUINN. manner in which he was to sink the well, or to act on directions
 Sir Ignatius J. given by him. In these circumstances, there was evidence to
 O'Brien C. justify the inference drawn by the County Court Judge; and we
 have no jurisdiction to interfere with his finding. If the County
 Court Judge had drawn the inference that the applicant was a
 workman within the meaning of the Act, a very interesting
 question of law would have arisen.

RONAN L.J. :—

The test for determining whether or not a particular person is a servant has been laid down by Buckley L.J. in *Simmons v. Heath Laundry Company* (1), where at p. 553 he says :—" In each case the question to be asked is, what was the man employed to do; was he employed upon the terms that he should within the scope of his employment obey his master's orders, or was he employed to exercise his skill and achieve an indicated result in such manner as, in his judgment, was most likely to ensure success? Was his contract a contract of service within the meaning which an ordinary person would give to the words? Was it a contract under which he would be appropriately described as the servant of the employer?" There is nothing to show that the County Court Judge applied any other test than this; nothing to show that he misdirected himself as to the test to be applied. The only remaining question in the case is this :—Was he bound as a matter of law to find on the evidence in this case that the man was a servant of the respondent? In my opinion he was not so bound. The question is not whether as a matter of fact we should be of opinion on the evidence that Hughes was a servant. The question is not whether the decision could be disturbed if the County Court Judge had found that he was a servant. The only question is whether in point of law he was entitled to come to the conclusion of fact on which his decision was based.

(1) [1910] 1 K. B. 543.

MOLONY L.J. :—

I concur. The appellant was employed as a well-sinker, and was paid at the rate of 8s. a day or 48s. a week. He did not retain the whole of the 8s. for himself, as he had to pay a labourer 3s. a day. The appellant supplied all the tackle, and there is no doubt that the respondent did not exercise any control, nor could he exercise any control in regard to the way in which Hughes was to carry out the sinking of the well. The vital element of control was entirely absent; and the question we have to consider is, as was put by Cozens Hardy M.R. in *Curtis v. Plumtre* (1): Was there or was there not evidence reasonably fit for the consideration of a jury? I have no doubt that not only was there such evidence, but if I were considering it as a juror I should have decided it in the same way as the County Court Judge.

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HUGHES
v.
QUINN.

Solicitor for the applicant: *J. Skeffington.*

Solicitor for the respondent: *W. J. Reynolds.*

C. L.

(1) 6 B. W. C.-C. 87.

Appeal.

1917.

May 1.

HEALY, APPLICANT; REILLY, RESPONDENT (1).

*Master and Servant—Workmen's Compensation Act—Partial Dependency—
Claim by Parent—Amount of Assessment—Services rendered by deceased
to Applicant.*

A boy of fourteen years of age was fatally injured by an accident arising out of and in the course of his employment. He was employed during four months of the year at the rate of 7s. a week plus his dinner and tea, and he handed over all his earnings to his mother, the applicant, who was a small farmer. The County Court Judge found that the mother and brothers and sisters of the deceased were partially dependent on him, and he awarded £100 compensation to be apportioned amongst them.

Held, that at the time of the accident there was partial dependency; that the Court was not precluded by law from taking into consideration the custom of the country that boys of the age of the deceased usually assisted in farm work on their parents' holdings; and that so long as the County Court Judge had given an amount within the maximum, the Court of Appeal had no right to inquire into the quantum of the award.

APPEAL from an order of the County Court Judge of Meath, sitting as an arbitrator under the Workmen's Compensation Act, 1906 (6 Edw. 7, c. 58), sect. 13, First Schedule, sect. 1 (a) (ii), awarding £100 compensation to the applicant and her children as partial dependants of William Healy, a boy of fourteen years of age, who met with a fatal accident whilst employed by the respondent.

The deceased boy was a son of the applicant, and was employed by the respondent during the summer months. The respondent's corn was in stacks, and the boy, by direction of his employer, used a gun to scare away birds from the corn. On Sunday, October 17th, 1915, he took the gun out and returned in about ten minutes, his hands and throat bleeding. He died in nine days. After his death the applicant asked the respondent why he gave the boy a gun, and he replied that he thought the boy had sense to manage it. The respondent, in his evidence, admitted that he gave the gun to the boy in September, and told him "to

(1) Before SIR IGNATIUS J. O'BRIEN C., and RONAN and MOLONY L.JJ.

point it at the crows." There was a charge in the gun; and he also gave deceased a powder-flask. Respondent told the boy to return the gun "after a few shots and after the corn was stacked." The gun was returned and the respondent put it in the kitchen. Soon afterwards the boy took it away, and it was not again returned by him. After the accident the gun was found in a cock of hay in a field adjoining the respondent's land. The respondent sought to make the case that the deceased was in the habit of using the gun for his own purposes, but the only evidence to that effect was that of a witness who stated that the boy told him one day he had shot at a rabbit.

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During four years in succession the deceased had been employed by the respondent about three or four months each summer. His wages, which at first were at the rate of 5s. a week, were increased to 7s. a week in the fourth summer. He slept, and took his breakfast, at home; his dinner and tea were supplied by the respondent. He gave all his earnings to the applicant, his mother. The applicant occupied a cottage and seven acres of land at £7 11s. 0d. yearly rent. Her husband was nine years dead; and she had four other children, the eldest being thirteen and the youngest nine years of age. In the winter months the deceased attended school.

The County Court Judge drew the inference of fact that the gun and powder-flask were given by the respondent to deceased to be used in the course of deceased's occupation about respondent's farm. He further drew the inference that the accident arose out of and in the course of the deceased's employment. He found that the applicant and her four children were partial dependants, and he awarded £100 compensation apportioned as follows:—£50 to applicant, and £12 10s. to each of the four children.

The respondent appealed on the grounds—1, that there was no evidence to support the inference that the gun and powder-flask were given to the deceased to be used by him for the purposes of the respondent; 2, that the injury by accident did not arise out of and in the course of the employment; 3, that there was no evidence to support the finding of partial dependency; and 4, that the amount of compensation awarded was in excess of that prescribed by the Act.

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The Court held that there was evidence to justify the first two findings of the County Court Judge; and the case is reported only on the questions of dependency and the amount of the award.

Murnaghan, for the appellant:—

Proof of dependency, total or partial, was not given by the applicant. Taking a whole year, the earnings of the deceased would roughly amount only to 2s. 4d. a week, and the cost to his mother of his keep would greatly exceed that sum. It is laid down in *Tamworth Colliery Company v. Hall* (1) that in such a case the cost of maintenance ought to be set against earnings, and that, if the two items balance, there is no dependency. The applicant was not, in the words of sect. 13 of the Workmen's Compensation Act, 1906, "wholly or in part dependent" upon the earnings of the boy at the time of his death.

Even if there had been total dependency, the maximum amount of the award would have been £150: Workmen's Compensation Act, 1906, First Schedule, 1 (a) (i). In the case of partial dependency the compensation must be "reasonable and proportionate to the injury" to the dependant: Workmen's Compensation Act, 1906, First Schedule, 1 (a) (ii). Assuming partial dependency in this case, the amount awarded is out of all proportion to any financial loss that could have been sustained by the applicant.

Hanna K.C. (with him *J. Dixon*), for the respondent:—

If the cessation of the workman's wages causes actual pecuniary loss to the applicant for compensation, there is dependency. The question is one of fact to be determined by the County Court Judge on consideration of all the circumstances of the case: *Tamworth Colliery Company, Ltd., v. Hall* (2). In *Hodgson v. West Stanley Colliery* (3) it was held that a mother and her family were dependent upon those who supplied them with the means of subsistence, namely, in that case, her husband and each of her two deceased sons. Here the deceased gave all his earnings to his mother. That is clear evidence of partial dependency. Beyond

(1) [1911] A. C. 665; 4 B. W. C. C. 313. (2) [1911] A. C. 665, at p. 668;
4 B. W. C. C. 313. (3) [1910] A. C. 229.

all doubt the mother was a dependant at the time of the accident. FitzGibbon L.J. lays down, in *Queen v. Clarke* (1), at page 152, that: "The object of the Act is to provide compensation for prospective pecuniary loss caused by the death of a workingman, and by the consequent destruction of his power to earn money, which, if he lived, would probably be spent in due proportion for the benefit of those naturally dependent on him. The object is the same as that of the Fatal Accidents Act, 1846."

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Murnaghan, in reply.

SIR IGNATIUS J. O'BRIEN C.:—

The deceased boy was employed between three and four months of the year at the rate of 7s. a week; and, in addition, got his dinner and tea from the employer. The evidence is that he gave the whole of his wages to his mother; and it has been argued that as the earnings during the period of employment, if spread over the whole year, would amount to only about 2s. 4d. a week, the County Court Judge ought to have drawn the inference that there was no dependency. I am unable to adopt that view. The boy's people were in very poor circumstances, and the value of what the mother gave to him during the term of the employment was very little. All he got at home was his sleeping accommodation and his breakfast. In that state of facts there was sufficient evidence before the County Court Judge to warrant the inference that, at the time of the accident, there was partial dependency; but it is said that as the wages have to be spread over twelve months, or some other period, there was no dependency.

We are not bound to guess or assume, knowing the circumstances of the country, that during the remainder of the year this boy would not have helped his mother in her little farm. In these circumstances I cannot arrive at the conclusion that 2s. 4d. a week would mathematically represent the loss on the whole year that she sustained through his death. Even if it was only 2s. 4d., that would be enough, having regard to the poor position of the mother, to establish partial dependency. In some districts of Ireland poor people have to exist on 5s. a week allowed them

Appeal. under the Old Age Pensions Act. Once the fact is proved that
 1917. the boy gave his mother the whole of his earnings, the applicant
 HEALY has sufficiently satisfied the onus of proof; and there is no obliga-
 v. tion on her to go back twelve months, to produce account-books
 REILLY. and show how much she estimated for her son's services.
 Sir Ignatius J. O'Brien C.

It has been argued that as the amount of compensation awarded—£100—was out of all proportion to the loss that could in any event have been sustained, the County Court Judge must, in assessing the sum, have proceeded on a basis erroneous in law. I admit that if the County Court Judge had given to us—and it might be convenient had he done so—the basis on which he fixed that amount, it is possible that we might come to the conclusion that some of his grounds were not well founded, and that we would send the case back to him with directions to proceed on a different principle. I think, however, it would be most unsatisfactory if, in the absence of anything to show that he adopted a wrong principle, we were to speculate as to whether he based his estimate on illegal considerations so long as the amount is within the maximum fixed by the statute. We ought to avoid, so far as we can, involving these cases in a maze of legal difficulties. Although the amount of compensation appears *prima facie* to me to be larger than I would be disposed myself to award, I must not forget that it was open to the County Court Judge to take all the circumstances into account, and that the statute makes him an arbitrator to fix, within a maximum, the sum which ought to be awarded. I do not think this Court ought to assume errors where they do not appear on the face of the proceedings.

RONAN L.J. :—

In this case the County Court Judge tells us “that the only question of law in this case” was whether the accident arose out of and in the course of the employment. He held that it did, and we have affirmed his decision so far. A further question has been raised as to whether there was any evidence on which he was justified in finding that the applicant and her children were dependants. The boy was fourteen years old, and for four years had been earning wages for part of each year in the service of the respondent, a farmer.

I think the County Court Judge was entitled to assume that in his spare time, i.e. when not in his employment, and before and after school hours, the boy rendered services to his mother on her little farm of seven acres. There is no actual evidence reported as to this, probably because the judge did not understand that any question of law was raised in reference to this part of the case. But, wholly apart from this, I think there was not only evidence, but conclusive evidence, of dependency.

Under sect. 13 "dependants" means "such of the members of the workman's family as were wholly or in part dependent upon the earnings of the workman at the time of his death." This is the date to be looked at: see *Smith v. Cope* (1). At this date and for some time previously, the boy was earning 7s. per week, and the whole of it was paid to his mother and applied for the support of the family. This far exceeded the cost of the boy's bed and breakfast. In these circumstances I think there can be no doubt that at the time of his death the members of the family were in part dependent on his earnings.

The Judge awarded £100 compensation. What were his jurisdiction and duty in this respect? Once the fact of partial dependency was established, the First Schedule 1 (a) (ii) provides that the compensation shall be "such sum not exceeding in any case the amount payable under the foregoing provisions, as may be agreed upon or, in default of agreement, *may be determined on arbitration under this Act to be reasonable and proportionate to the injury to the said dependants.*" It was not suggested before us that the award exceeded the statutory limit. Subject to this the amount is regulated by the words I have put in italics.

This is very like the measure of damages in an action under Lord Campbell's Act, viz., "Such damages as they" (the jury) 'may think proportioned to the injury resulting from such death to the parties respectively for whom and for whose benefit such action shall be brought,' substituting the arbitrator for the jury. The identity of the expression "proportionate to the injury" can hardly have been accidental. Now, if this were a case under Lord Campbell's Act, and we were asked to set aside the verdict on the ground of the damages being excessive, I do not think we

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(1) 6 B. W. C. C. 569.

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could have done so, having regard to the judgments of the House of Lords in the recent case of *Taff Vale Railway Co. v. Jenkins* (1). Neither could we have held that there was no evidence of damage.

In my opinion, we have not the jurisdiction in these cases that exists in actions, viz., a power to set aside verdicts, either on the ground of being against the weight of evidence or of excessive damages. The language of the First Schedule 1 (a) (ii) is an entire departure from that of 1 (a) (i). In the latter, the measure of compensation is a sum equal to the actual or estimated earnings for three years; in the former, a sum proportionate to the injury. I do not think we ought to come to the conclusion that the Judge must have misdirected himself as to the measure of damages, and in my opinion, unless we come to that conclusion, we cannot interfere with his decision on the ground that the amount is excessive. The cases of *Bevan v. Crawshay* (2) and *Cheverton v. Oceanic Steam Navigation Co.* (3) seem to me to establish that once partial dependency is established, then, subject to the statutory maximum, it is entirely a matter for the Arbitrator to determine the sum reasonable and proportionate to the injury to the said dependants. In the former of these cases, it is pointed out that these words are practically identical with the terms of Lord Campbell's Act. The Court held that they might include funeral expenses, although these could not be recovered under Lord Campbell's Act. It is plain that they were not "earnings" and could not be recovered under sect. 1 (a) (i) of the Schedule.

MOLONY L.J. :—

As to the question of dependency the County Court Judge was at liberty to have regard to his knowledge of all the circumstances of small farmers in the country. The boy's mother was a widow for nine years, with a cottage and seven acres of land, in respect of which she paid a rent of £7 11s. a year. The deceased, aged fourteen, was her eldest son; the next eldest was thirteen years of age; and the youngest child was nine years of age. A boy of fourteen in the country, even when attending school, has considerable leisure, as the school hours extend only from 9 a.m.

(1) [1913] A. C. 1. (2) [1902] 1 K. B. 25. (3) 6 B. W. C. C. 574.

to 3 p.m. He has the whole of Saturday and Sunday; and we know that such a boy can be extremely useful on a small farm.

The deceased seems to have been a good boy and a steady worker. During four summers he had been employed by the respondent, first at 5s. a week, and during the last summer at 7s. a week. In addition, the employer gave him his dinner and tea. All his mother supplied was his bed and breakfast. His bed involved no extra cost; and so far as actual pecuniary expense was concerned it was confined to the breakfast, which would not cost 1s. a day or anything approaching that sum. If a young boy did nothing at home except smoke cigarettes and keep his hands in his pockets, and if what he earned outside was barely sufficient for his keep, then clearly there would be no evidence of dependency; but the circumstances of the present case are obviously distinguishable from those of the case I have suggested.

The Court is not precluded by law from taking into consideration what we all know to be the ordinary custom of the country: namely, that boys of the age of the deceased usually assist in general farm work. The effect of Lord Loreburn's judgment in the *Tamworth Case* (1) is, it seems to me, very clearly stated in the order which reads: "the cause to be remitted to the County Court Judge with an instruction that in determining the question of the alleged partial dependency of the father on the earnings of the son he is not precluded by law from making a deduction in respect of the son's maintenance, nor is he precluded by law from taking into account as against the cost of the son's maintenance, the pecuniary value, if any, of the services rendered by the son to the father in the latter's business as a barber." I am satisfied that in this case there is some evidence of partial dependency.

I am also satisfied upon the authorities, particularly *Roberts and Ruthven v. Hall* (2), that once we hold there is partial dependency we cannot inquire into the quantum of compensation. The County Court Judge has perhaps awarded a larger amount than we should give if considering the case for the first time; but we have no right to inquire into the quantum of the award.

Solicitor for the applicant: *Thomas Noonan*.

Solicitor for the respondent: *D. J. Reilly*.

C. L.

(1) [1911] A. C. 665.

(2) 5 B. W. C. C. 331.

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Molony L.J.

THE KING (AT THE PROSECUTION OF THE NORTH DUBLIN
RURAL COUNCIL) *v.* LOCAL GOVERNMENT BOARD
FOR IRELAND (1).

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1917.

May 3, 4, 15.

Appeal.

June 18, 19,
20.

*Town—Existence and extent of—Order of Local Government Board defining
Boundaries—Certiorari inapplicable—Towns Improvement (Ireland) Act,
1854 (17 & 18 Vict. c. 103).*

Where a town seeks to adopt the provisions of the Towns Improvement (Ireland) Act, 1854 (17 & 18 Vict. c. 103), and the town at the date of the application has no defined boundaries, such town must have at least 1500 inhabitants according to the last census returns. The existence and extent of such town are matters of fact to be determined by the Local Government Board on such application. The unit selected by the census enumerator as a "town" is not necessarily the town as it actually exists, and is not the standard by which the existence and extent of the town under the Act is to be ascertained.

The order of the Local Government Board finally approving of the adoption of the Towns Improvement (Ireland) Act, 1854 (17 & 18 Vict. c. 103), being made final and conclusive proof for all purposes by sect. 15 of that statute, cannot be quashed on certiorari. So *held* by the King's Bench Division and the Court of Appeal.

R. (Dixon) v. L. G. B., 2 L. R. Ir. 316, over-ruled; *R. (Eustace) v. L. G. B.*, 44 I. L. T. R. 176, applied.

MOTION to make absolute a conditional order for a writ of certiorari to bring up for the purpose of being quashed, sealed orders of the Local Government Board for Ireland, dated respectively the 17th January and the 22nd March, 1917.

On the 8th July, 1916, the Local Government Board received an application, dated the 17th June, 1916, to adopt the provisions of the Towns Improvement (Ireland) Act, 1854 (17 & 18 Vict. c. 103), to the township of Howth, as described by boundaries specified in the application. The application was signed by 290 persons, who were Local Government electors and householders. The area specified was as follows:—"The townlands of Howth,

(1) Before SIR JAMES H. CAMPBELL, Bart., C.J., and GIBSON and MADDEN JJ.; and in the Court of Appeal, before SIR IGNATIUS J. O'BRIEN, Bart., C., and RONAN and MOLONY L.JJ.

Howth Demesne, Quarry, Sutton North, Sutton South, Censure, Burrow, and Kilbarrack Lower, all in the North Dublin Rural District and county of Dublin," and contained a population, according to the census of 1911, of 3267 persons. When the required statutory publications had been made, and the statutory period had elapsed, the Local Government Board issued their sealed order, dated the 17th January, 1917, pursuant to sect. 4 of the Towns Improvement (Ireland) Act, 1854 (17 & 18 Vict. c. 103), approving of the proposed boundaries, and directing two qualified justices to convene the statutory meeting for the purpose of considering the adoption of that Act. The meeting was held on the 17th February, and, when all present who were not Local Government electors had withdrawn by direction of the chairman, a resolution was put to adopt the Act, and carried by a large majority. The justices reported the result of the meeting on the 23rd February to the Local Government Board.

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On the 14th March, 1917, the prosecutors applied to the Master of the Rolls, sitting as vacation judge, for a conditional order for a certiorari to bring up and quash the Board's order of the 17th January, 1917. By direction the application was subsequently heard as an application for an absolute order on notice to the Board, and was refused by the Master of the Rolls on the 21st March, 1917.

On the 22nd March, 1917, the Local Government Board issued their sealed order approving of the adoption of the Towns Improvement (Ireland) Act, 1854, by the "town of Howth," bounded as in their order of the 17th January, 1917, directing the division of the township into wards, and the number of commissioners to be elected.

On the 22nd March, 1917, the respondents served notice of appeal from the order of the 21st March, 1917, of the Master of the Rolls. This appeal was pending when this motion was heard by the Divisional Court.

On the 28th March, 1917, the North Dublin Rural District Council, the prosecutors, obtained a conditional order to bring up for the purpose of being quashed the two sealed orders of the Local Government Board, dated, respectively, the 17th January, and the 22nd March, 1917.

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The following were the grounds alleged for quashing these orders:—"1. That said order, dated the 17th January, 1917, and said order, dated the 22nd March, 1917, were, respectively, made without and in excess of jurisdiction. 2. That the said order, dated the 17th January, 1917, and said order, dated the 22nd March, 1917, were made without and in excess of jurisdiction, inasmuch as there was no town in existence within the meaning of the Towns Improvement (Ireland) Act, 1854, in respect of which said orders, or either of them, could lawfully have been made. 3. That the town of Howth does not contain a population of 1500 inhabitants, as ascertained by the last population returns, made pursuant to Act of Parliament, and there was no jurisdiction to make said orders, or either of them, in respect of said town. 4. That said orders were not made upon the application of twenty-one householders of a town within the meaning of the Towns Improvement (Ireland) Act, 1854, and there was no jurisdiction to make them, or either of them. 5. That there was no evidence upon which the Local Government Board for Ireland could lawfully find that the areas specified in said orders constituted a town within the meaning of the said Act. 6. That the said orders are bad on their face. 7. That there is no jurisdiction under sect. 15 of the said Act to make the said order, dated the 22nd March, 1917."

From the census returns for 1911 for the province of Leinster the "town of Howth" was returned as containing 1357 inhabitants, and a note was added that the area, designated by the enumerator as the "town of Howth," contained thirty-five acres, and stood on the townland of Howth, in which townland its area and valuation were included. It was stated in argument that the area selected by the census enumerator as the town of Howth excluded the railway-station and the piers and harbour and a terrace of houses, and that the boundary-line of this area actually bisected one of the most important business houses in what was popularly termed the town of Howth.

The area within the boundaries proposed by the application of the 17th June, 1916, was nearly 3000 acres. It included the uninhabited island of Ireland's Eye, and contained in the census returns of 1911 a population of 3267 persons.

Mr. Barlas, Secretary to the Local Government Board, in his affidavit showing cause, stated that the Board had always great difficulty as to the application of the Act in respect of towns without defined boundaries, and that, accordingly, the practice of the Board had been to ascertain the population, according to the last census returns, within the proposed boundaries, as had been done on the constitution as towns of Killiney and Ballybrack, and of Portstewart. In the latter case the population within the area selected by the census enumerator as the town of Portstewart was, according to the returns of 1911, 1459 persons, while, by the same returns, the population of the area in respect of which the Act was proposed to be and was adopted was over 1500 persons.

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The following are the material portions of the sections of the Towns Improvement (Ireland) Act, 1854 (17 & 18 Vict. c. 103), referred to in the argument and judgments:—

1. The following words and expressions in this Act shall have meanings hereby assigned to them, unless there be something in the subject or context repugnant to such construction (that is to say), the word "town" shall mean and include city, town corporate, borough, market town, or other town in Ireland, containing a population of 1500 inhabitants or upwards, as ascertained by the last population returns made pursuant to Act of Parliament; the word "householder" shall mean a male occupier of a dwelling-house, or of any lands, tenements, or hereditaments within the prescribed boundaries of the town rated to the relief of the poor in respect thereof; the word "occupier" shall extend to and include an immediate lessor made liable under the Act to assessments in cases of premises of such annual value as hereinafter mentioned.

4. Upon the application of twenty-one or more householders of any city or town in Ireland, each of such householders occupying a dwelling-house, or other lands, tenements, or hereditaments within such city or town, and rated in respect thereof for the relief of the poor at the net annual value of £8 or upwards applying that this Act or that specific portion (described as hereinafter provided) may be carried into execution in such city or town, which application shall specify the boundaries proposed for the purposes of this Act, and a copy of which application shall be inserted in the *Dublin Gazette*, and in one or more newspaper or newspapers published in such city or town, and if none be therein published, then in one or more newspaper or newspapers published nearest to such city or town, it shall be lawful for the Lord Lieutenant, one month after the receipt of such application, and if he shall approve of such proposed boundaries, to order and direct, that . . . any two or more

K. B. Div. justices of the peace resident within ten miles of such town, shall convene a
 1917. meeting for the purpose of considering the carrying of this Act into execution,
 R. and one of them shall preside thereat . . . and a copy of such orders and
 (N. DUBLIN directions with the names of the parties signing the application for the same,
 RURAL and the boundaries so approved of, shall be inserted, under the direction of
 COUNCIL) such chief or under secretary in such gazette and newspaper or newspapers as
 v. L. G. B. aforesaid.

5. Any such order or direction as aforesaid shall describe and specify the proposed boundaries, for the purposes of the Act, of such city or town, and the same shall be in like manner published in such gazette and newspaper or newspapers as aforesaid; and if this Act shall be adopted in manner therein mentioned in the whole or in part, such boundaries, so approved of as aforesaid, shall be deemed to be the boundaries of such city or town for the purposes of this Act.

7. At any such meeting convened as aforesaid such persons as hereinafter mentioned shall be admitted and entitled to vote, and no other person whatsoever; that is to say, every person of full age who is the immediate lessor of lands, tenements, and hereditaments within such town, or within such boundaries of the same respectively as aforesaid, of the value of £50 or upwards according to the last poor law valuation, and who shall reside within five miles of the boundary of such town; also every person of full age who shall have occupied as tenant or owner or shall have been immediate lessor (rated for such premises to the relief of the poor) of any lands, tenements, or hereditaments, within such city or town, or within such boundaries of the same respectively as aforesaid, and shall have been rated in respect of such premises for the period of twelve months preceding . . . as occupier of such lands, tenements, or hereditaments, at a net annual value of £8 or upwards.

15. The person or persons presiding at such meeting shall, within one week, transmit to the Lord Lieutenant, a copy, certified under his or their hand, of the resolution and determination of such meeting as aforesaid, and within one month after such resolution or determination shall have been so certified, in case such resolution or determination shall be in favour of adopting the execution of this Act, in whole or in part, and in case the Lord Lieutenant shall approve of the same, he shall notify his approbation thereof to the said person or persons, and fix the number of commissioners to be elected for carrying this Act into execution in such town, and cause notice of such approbation to be published in the *Dublin Gazette*; and from and after the day to be named in such notice in that behalf, either the whole of the Act, or the portion thereof so adopted and approved, shall be applicable to and in such town; and the production of a printed copy of such gazette containing such notice shall be deemed and taken to be in all courts and places final and conclusive evidence for all purposes that all the proceedings, acts, matters, and things required by this Act to be had or done for the adoption of this Act

in whole or in part, well and sufficiently done, and that the Act is in force, in whole or in part, as the case may be, in the town to which such notice relates. *K. B. Div.*
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25. Every person who shall have been for twelve months preceding the 1st day of January in the year in which such election is held the immediate lessor of lands, tenements, and hereditaments within such town, or within such boundaries of the same respectively as aforesaid of the value of £50 or upwards, according to the last poor law valuation, and who shall reside within five miles of the boundary of such town, and also any householder or occupier of full age, rated to the relief of the poor in respect of a dwelling-house in the town of the net annual value of £12 or upwards . . . shall be eligible to be elected a commissioner. R.
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Schedule (A).—Notice is hereby given . . . that on the day of the rated occupiers and lessors hereinafter mentioned of premises of the annual value of £8 and upwards in the city or town of [or, where the boundaries have been ascertained by the Lord Lieutenant's order under this Act, within the boundaries following (repeat them as in the said order)], are required to meet, &c.

By sect. 2 of the Local Government Act, 1872 (35 & 36 Vict. c. 69), the powers vested in the Lord Lieutenant under the Towns Improvement (Ireland) Act, 1854 (17 & 18 Vict. c. 103), were transferred to the Local Government Board.

The Local Government (Application of Irish Enactments) Order, 1899 (30th January, 1899), Vanston's Municipal Towns, p. 496, provides:—

15. In the Towns Improvement (Ireland) Act, 1854, "householder" shall mean Local Government elector registered in respect of a qualification in the town, in substitution for the definition contained in sect. 1 of that Act.

16. In sect. 7 of the Towns Improvement (Ireland) Act, 1854, "the Local Government electors registered in respect of qualifications within the town" shall be substituted for "such persons as next hereinafter mentioned."

By Article 20 the form of Schedule A is adapted by substituting "Local Government electors registered in respect of qualifications in the city or town [or, where boundaries have been ascertained by the Lord Lieutenant's order under this Act] within the boundaries following, for the persons to whom notice is given under the original form.

Sect. 25 of the Towns Improvement (Ireland) Act, 1854, above quoted, was repealed by sect. 110, sch. 6 (Part 3), of the Local Government Act, 1898 (61 & 62 Vict. c. 37).

*K. B. Div.**Jellett K.C.* (with him *Murnaghan*), for the prosecutors:—

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The Local Government Board cannot move until there is a "town" as defined by the Towns Improvement (Ireland) Act, 1854 (17 & 18 Vict. c. 103): if there is not such a town, there cannot be persons with the qualification of Local Government electors within the town, and only persons so qualified can make the application: Towns Improvement (Ireland) Act, 1854 (17 & 18 Vict. c. 103, ss. 1 & 4).

The census is made the statutory test of what the "town" is: Towns Improvement (Ireland) Act, 1854, s. 1. The census returns of 1911 deal with Howth town as a unit, estimated to contain 35 acres, and that unit is separated by the return from the townland of Howth. The decision in *R. (Dixon) v. Local Government Board* (1) is conclusive. The language of sect. 15 of the Act is different from the analogous provision in the Labourers Act. It merely provides for a matter of evidence; it does not make the order of the Board final and conclusive with the effect of an Act of Parliament.

Wylie K.C., D. Henry K.C. (with them *Overend*), for the Local Government Board:—

The orders of the Board cannot be impeached, because (a) they were properly made, as the prescribed area contained more than 1500 inhabitants; and (b) the prosecutors have no interest in restraining the application of the Act.

As to the test of population, there are no boundaries defined by the Census Acts, and there is nothing as to boundaries in the definition of "town" in sect. 1 of the Towns Improvement (Ireland) Act, 1854 (17 & 18 Vict. c. 103); but "householder" is defined as "a male occupier of a dwelling-house, or any lands, tenements, or hereditaments, within the prescribed boundaries of the town." The prescribed boundaries can only be found in the Act in the provisions as to the area to which it is intended to apply the Act. In fact, there are several towns which have adopted the Act, which according to the census returns of towns have not 1500 inhabitants (see Thom's Official Directory, 1917, p. 672).

(1) 2 L. R. Ir. 316.

In the case of Killiney and Ballybrack, the census return for the "town of Killiney" only showed a population of 158 persons at the date when the Act was adopted. The Local Government Board must have the power of determining whether there is, in fact, a "town" with 1500 inhabitants; otherwise the Board would be at the mercy of the census enumerator, and once that officer had arbitrarily defined the "town" the Act could not be applied until after the next census if the enumerator returned less than 1500 inhabitants for the area he had selected as a "town."

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Section 15 of the Act of 1854 makes the order of the Board "final and conclusive." On the authority of *R. (Eustace) v. Local Government Board* (1) and *R. (Duffy & Kelly) v. Deane and County Court Judge of Tyrone* (2) this makes it impossible to attack the order of the 22nd March, 1917, by certiorari; and as sect. 15 was not referred to or considered in *R. (Dixon) v. Local Government Board* (3), the case does not bind this Court in this respect.

The prosecutors are not affected unless and until the new township is made an urban district. Before that is done the prosecutors will have an opportunity of making any opposition they deem necessary. At present their interest, if any, is so minute that this Court in the exercise of discretion should refuse the application.

E. Murphy (with him *T. M. Healy K.C.*), for Local Government Board electors:—

The area of the "town" of Howth, given in the census of 1911, is an "estimated area." There is no defined area on which the Board could work. It cannot have been intended by the Legislature that the application of the Act should have been made dependent upon the arbitrary act of a census officer. In 1861, when the Act was adopted by Killiney and Ballybrack, there was no town of Ballybrack in the census returns, and the Act was applied to a very large area, in which the only "town," as returned by the census authorities, was the town of Killiney, containing, in 1860, 128 persons.

(1) 44 J. L. T. R. 176.

(2) Unreported.

(3) 2 L. R. Ir. 316.

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Whether there is or is not a "town" to which the Act can be applied is a question of fact, and it must be decided by the Board on familiar principles: *R. v. Cottle* (1); *London & South-Western Railway Co. v. Blackmore* (2).

Jellett K.C., in reply:—

R. (Dixon) v. Local Government Board (3) was followed in *R. (Wexford County Council) v. Local Government Board* (4). As regards the proposition that the orders of the Board can be attacked on certiorari, sect. 15 of the Towns Improvement (Ireland) Act, 1854, 17 & 18 Vict. c. 103, is only made conclusive as to proof: that does not make the order of the Board thereunder impregnable: see *Ex parte Geisel* (5).

Cur. adv. vult.

SIR JAMES CAMPBELL C.J.:—

This was an application by the prosecutors, the North Dublin Rural District Council, to make absolute a conditional order of March 28, 1917, to remove into this Court for the purpose of being quashed a certain order of the Local Government Board, dated the 17th January, 1917, and also a further order of the same Board, bearing date the 22nd March, 1917. It appears that in the month of July, 1916, a memorial, signed by several hundreds of persons upon the register of Local Government electors within the area of the proposed boundaries of the town of Howth, was addressed to the Local Government Board, asking for an order that the Towns Improvement Act, 1854, be applied and carried into execution within the area included within the said boundaries. The Local Government Board, upon receipt and after full consideration of the said memorial, made under their seal the order of the 17th January, 1917, which is the first of the two orders impeached by this application, whereby the Board signified its approval of the proposed boundaries, and directed certain justices, as qualified by the said Act of 1854, to convene the prescribed meeting for the purpose of considering the application of the Act within the said boundaries. A meeting, duly convened for the purpose, was accordingly held upon February 17th, 1917, and

(1) 16 Q. B. 415.

(2) L. R. 4 H. L. 615.

(3) 2 L. R. 1r. 316.

(4) [1902] 2 I. R. 349.

(5) 22 Ch. D. 436.

the proposal to adopt the Act was carried by an overwhelming majority of the persons present. The Local Government Board thereupon, upon March 22nd, 1917, made under their seal the second order which is impeached in this case, whereby they approved the application of the Act to the area within the said prescribed boundaries, and proceeded by said order to give certain supplementary directions. A conditional order was, subsequent to the order of the 17th January, obtained by the present applicants from the Master of the Rolls during the March Assizes for the purpose of quashing it; but a subsequent motion to make this conditional order absolute was refused by the Master of the Rolls, and at the hearing of the present application, an appeal from the said order of the Master of the Rolls was stated to be pending in the Court of Appeal. Immediately after the order of the Master of the Rolls refusing to make absolute the conditional order, the second order of the Local Government Board of March 22nd, 1917, was issued, and thereupon the conditional order in the present case was obtained, seeking to have both orders of the Local Government Board quashed. They are impeached upon one ground only, namely, that they have been made without and in excess of jurisdiction, inasmuch as a condition precedent was never fulfilled, namely, an application to the Local Government Board, under the Act of 1854, sect. 1, by twenty-one persons on the Local Government register for a town with a population of not less than 1500 persons, as ascertained by the returns of the last preceding census. I am satisfied upon the evidence that the application in this case was made by a number of such electors on the register for the place which the prosecutors insist must be taken as the town of Howth, considerably in excess of the required number of twenty-one; but I am also satisfied that the so-called town of Howth did not, at the date of the application, contain a population of 1500 persons. Upon this branch of the case, therefore, the question for decision is, what are the boundaries of the town of Howth for the purpose and within the meaning of sect. 1 of the Act. Mr. Jellett, on behalf of the prosecutors, strenuously contended that for this purpose we must look to the census returns only, and, if so, it is certain that the town of Howth, as therein defined, did not according to the census returns contain in July,

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K. B. Div. 1916, a population of not less than 1500 inhabitants. It is plain
 1917. from the language of sect. 1 of the Act, that once one has the
 R. "town" defined, one must look to the census returns to ascertain
 (N. DUBLIN its population; but I find nothing in the Act that requires one to
 RURAL look for the defined town to the same source. In the absence of
 COUNCIL) any such requirement, the definition, in accordance with the
 v. decision in many cases, of which *London & South-Western Railway*
 L. G. B. *Co. v. Blackmore* (1) is the most important, would be a question
 Sir James of fact, regard being had to the fact that the word "town" is an
 Campbell C.J. expanding term, and includes the space covered by or necessary
 to a number of houses, more or less congregated together, and
 embracing lands unbuilt upon within the area lying between such
 connected houses. It is not, in my opinion, any part of the duty
 imposed upon the census authorities to ascertain and define the
 boundaries of towns, and the method of dealing with them in the
 census returns appears to be a purely arbitrary and perfunctory
 one. Every small accumulation of twenty or more houses is
 dignified by them with the name of "town," and the whole
 matter would thus be left to the caprice of a casual enumerator,
 with the result, as we were informed without contradiction, that
 in this particular case, the town of Howth, as defined in the
 returns, would exclude the entire townland of Howth and many
 important places, such as the railway-station, the castle and
 demesne of Howth, the piers and harbour, and a long terrace of
 houses on the side of the Hill, known as Nash's houses, while it
 actually cuts into two parts one of the principal business houses,
 leaving one-half within and the other half without the so-called
 town. It will be noted that, under sect. 1 of the Act, the appli-
 cation can be made by a city or a market-town, without any
 reference to population; and from a careful consideration of the
 machinery provided by the Act, in the case of a town such as
 Howth, I am satisfied that the area within the boundaries as
 prescribed and approved by the order of the Local Government
 Board, is, within the language of sect. 5 of the Act, to be the town
 for the purposes of the Act.

The definition of "householder" in sect. 1, as it stood
 originally, and before it was amended by the Local Government

(1) L. R. 4 H. L. 610.

Act Adaptation of Enactments Order, favours this construction ; and any other interpretation would enable the census enumerator, by an arbitrary definition, to exclude such a district as Howth for all time from the operation of the Act of 1854. It seems to me that in the case of such a district the Legislature has imposed upon the Local Government Board the power and duty to define by its order what the "town" is to include and mean for the purposes of the Act. We are told by the Local Government Board Secretary that his Board have acted upon this assumption for many years past in administering the provisions of the Act, and the cases of Killiney and Portstewart were cited as typical examples of their practice in this respect, as the population of each of the towns of Killiney and Portstewart at the date of the application to them of the Act of 1854, and as defined by the census returns, was only a few hundred. A reference to the list of towns in Thom's Official Directory, 1917, p. 672, which have adopted the Towns Improvement Act will furnish several similar examples. Mr. Jellett, as he was, fully entitled to do, insisted that this Court was bound by the decision in *Reg. (Dixon) v. The Local Government Board* (1), in which it was undoubtedly held that the word "town" in sect. 1 of the Act was the existing town, and not the "town" or "township" created and called into existence by the machinery of the Act. It is true that the town of Strandtown, as defined under the Act in that case, had still a population of less than 1500 inhabitants ; but the decision does not appear to have been based upon that fact but upon the ground I have already stated. I need hardly say that, in ordinary circumstances, I should feel bound loyally to follow a previous decision by this Court upon the precise question which we have now to determine ; but while this case can be and is being decided upon other grounds, I regard the case as unsatisfactory in many respects, and in its authority to have been wrecked in the light of more recent decisions, to which I shall presently refer. In the first place, the important words in sect. 5 of the Act to which I have already referred, and which constitute the area as defined by the order of the Local Government Board as the "town" for the purposes of the Act, are not referred to either in the arguments or judgments in that case

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K. B. Div. as reported; and the sole and only question that seems to have
 1917. been argued^a was whether the writ of certiorari applied, and this is
 R. important in its bearing upon the questions which remain to be
 (N. DUBLIN considered. Further, no reference whatever appears to have been
 RURAL made to the provisions of sect. 15 of the Act, which makes the
 COUNCIL) order of the Local Government Board, corresponding in this case
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 Sir James purposes of the Act. The effect to be given to such words, in the
 Campbell C.J. decision of an application such as that before us, has, in my
 opinion, been conclusively established in the case of *Rex (Eustace) v. Local Government Board* (1), decided in the Court of Appeal in June, 1910. It is strange that this most important case has never found its way into the authorized reports; but a very full account of it is to be found in the Irish Law Times Reports, vol. xlv, p. 176. Under the machinery of the Labourers (Ireland) Act, 1908, in all cases in which it was proposed to acquire lands compulsorily for the purposes of an improvement scheme, certain notices prescribed by the Act of 1883 were first to be served, including notice to the owner of the lands sought to be acquired. It then becomes the duty of the inspector of the Local Government Board to hold an inquiry, and if he approves, to make an order confirming the scheme, and his confirmation then becomes subject to the approval of the Local Government Board. Sect. 6, sub-s. 4, of the Act then provides that if the Local Government Board are satisfied that the prescribed regulations have been in all respects complied with, they may confirm or disallow the order; and then follow these all-important words, sub-clause (d):—
 “Upon any such confirmation by the Local Government Board, the order shall become final and have the effect of an Act of Parliament; and the confirmation by the Local Government Board shall be conclusive evidence that the requirements of this Act have been complied with, and that the order is duly made and within the power of the Labourers Act.” In *Eustace’s Case* (1) it was admitted that the prescribed notice had, in fact, through some oversight, never been served upon Major Eustace, the owner of the lands sought to be acquired; and in this Court, upon his application for certiorari to quash the order of the Local Government

(1) 44 I. L. T. R. 176.

Board, it was held by the Court (Palles C.B. and Kenny J.), following the previous decision of this Court in *Reg. (Whyte) v. Local Government Board* (1), that the service of the notice was a condition precedent to the jurisdiction of the Local Government Board to make the confirmation order under sect. 6; that the order was, therefore, bad upon its face, and, as it was a judicial act, certiorari applied, and the order must be quashed. Upon appeal, however, the Court of Appeal expressly disapproved of the decision in *Whyte's Case* (1), and reversed the order of the Court in *Eustace's Case* (2) upon two grounds—first that, in view of the language of sect. 6, sub-s. 4, of the Act, the order of confirmation by the Local Government Board was final and conclusive as to everything, including all conditions precedent to the making of the order by the inspector, and also to the making of the confirmation order by the Local Government Board; and, second, that this latter order was merely a ministerial act.

The first ground is expressed by Walker L.J. in his judgment in the following terms:—"Confirmation by the Local Government Board is made final and conclusive evidence of three things—1, regularity of the acts done; 2, due making of the order; 3, that the order is *intra vires* in all respects." Apply the principle of this decision to the following words in section 15 of the Towns Improvement Act:—"The production of a printed copy of the *Dublin Gazette* containing the notice of approval by the Local Government Board of the resolution of the prescribed meeting, adopting the Act, shall be deemed and taken to be in all courts and places final and conclusive evidence for all purposes that all the proceedings, acts, matters, and things required by this Act to be had or done for the adoption of this Act, in whole or in part, were well and sufficiently done, and that the Act is in full force and effect in the town to which such notice relates," and it becomes impossible to avoid the conclusion that *Dixon's Case* (3) cannot be reconciled with the decision of the Court of Appeal in *Eustace's Case* (2), and is no longer law. I should myself have arrived at this conclusion, wholly apart from the decision in *Eustace's Case* (2), and would have been quite prepared to differ from the decision in *Dixon's Case* (3), considering myself as at perfect

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(1) 43 I. L. T. R. 216. (2) 44 I. L. T. R. 176. (3) 2 L. R. Ir. 316.

K. B. Div. 1917. liberty so to do in view of the fact to which I have already called attention, that these vital words in section 15 of the Towns Improvement Act were completely ignored and overlooked in the case.

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Possibly no judge in recent years has been more willing to extend the application of the writ of certiorari in Ireland than Palles C.B., and in *Reg. (Wexford County Council) v. Local Government Board* (1), he cites with approval the decision in *Dixon's Case* (2), but in the recent case of *Rex (Duff & Kelly) v. Deane and County Court Judge of Tyrone* (3), which I believe is only reported in a useful collection of High Court Judgments, edited by the Local Government Board, that eminent and distinguished judge loyally followed and adopted the decision in *Eustace's Case* (4). The question turns, in somewhat analogous circumstances, upon the construction of the same section 6, sub-s. 4, the only material difference being that the confirmation order under the section was made by the County Court Judge, but he held that the final and conclusive effect given by the Court of Appeal in *Eustace's Case* (4) to the order, applied whether it was the ministerial act of the Local Government Board or the judicial act of the County Court Judge, and he accordingly refused to quash the order. *Eustace's Case* (4), in my opinion, absolutely rules the case now before us, not only as to the effect to be given to section 15, but also as to the confirmation order being a mere ministerial act. Speaking for myself, I welcome the decision in that case, and more especially upon its second ground, as it has placed a wholesome restraint upon the reiterated attempts in recent years to interfere by the writ of certiorari with the action of public departments, such as the Local Government Board, in matters which, though perhaps, in a sense, calling for and worthy of the exercise of the judicial faculty, are, in substance and effect, acts of administration simply.

I have only to add that had I found myself at liberty to follow the decision in *Dixon's Case* (2), I would not have applied it in this instance. In that case the applicants were two owners of property within the proposed town of Strandtown, but, in the present case, no objection to what has been done has, upon any

(1) [1902] 2 I. R. 349.

(2) 2 L. R. Ir. 316.

(3) Unreported.

(4) 44 I. L. T. R. 176.

real evidence before us, been raised by a single owner of property, ratepayer, householder, or occupier within the boundaries of the proposed town, and I am satisfied that they are practically unanimous in their support and approval of the project. The only objectors are the North Dublin Rural District Council, who are not as yet aggrieved in any real sense, but anticipate possible interference, should the new township decide to become an urban district. In the case of such applicants the writ does not issue *ex debito justitiæ*, but is within the discretion of the Court; see *Reg. (Bridgeman) v. Drury* (1), and particularly the judgment of Madden J. at p. 525, and in view of the fact that the proceedings in this case have reached their final stage, of the great public inconvenience that must ensue if these proceedings were now to be dislocated, and in deference to the practical unanimous approval of the inhabitants of what is now an accomplished fact, I hold it should still be a wise exercise of our discretion to refuse the present application, even if we had been coerced to accept Mr. Jellett's legal contention.

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GIBSON J. :—

I concur. As the case affects the practice of the Local Government Board under which many towns have been constituted and involves the effect of *Reg. (Dixon) v. Local Government Board* (2), I will state the reasons which have led me to the result stated by my lord.

The statute in its adapted form makes two material changes in the Act of 1854, altering the definition of "householder," now made "Local Government elector" registered in respect of a qualification in the town, and substituting, under the Act of 1872, the board, a justiciable entity, for the Viceroy. Neither change affects the meaning of "town." The construction of the legislation can only be arrived at by examining the statute of 1854.

That statute contains two sets of provisions regulating its adoption. The first set is contained in sects. 4 and 5 applicable to cities and towns alike, though in the definition "town" includes "city." The boundaries of cities were defined by 3 & 4 Vict. c. 108, and many probably by local statutes. Both cities and

(1) [1894] 2 L. R. 489.

(2) 2 L. R. Ir. 318.

K. B. Div. towns might have a debatable fringe of uncertain extent, and it
 1917. was therefore desirable that, as to the adoption of the Act of
 1854, the exact area from which the voters were to come should
 be accurately fixed. The application might propose existing
 statutory boundaries or new boundaries, but, whether the bound-
 aries were old or new, they had to be prescribed by the Lord
 Lieutenant. Form A in the schedule overlooks this apparently.
 The definition of "householder" makes his qualification depend
 on property "within the prescribed boundaries of the town." It
 is said that "prescribed" here means "actually prescribed," not
 "proposed to be prescribed," and that though applying to sects. 14
 and 25 (where the "householder" must be a person within the
 new defined town), the word does not describe or fit the applicant
 householder in sect. 4. That section is founded on 9 Geo. 4, c. 82,
 which prescribes application by twenty-one householders, quali-
 fied as therein, residing in any city or town. It has no definition
 of "householder," "city," or "town," and does not prescribe
 boundaries or any population condition. The investigation of the
 application and the decision were left entirely to the Viceroy.
 Under the statute of 1854 (which requires first, the boundaries to
 be fixed by the Lord Lieutenant, and secondly, his final approval
 of the decision of the constituency under sect. 15), who is to decide
 as to the competence of the applicants? The publication of the
 notices prescribed by sect. 4—not found in the Act 9 Geo. 4, c. 82—
 give opponents an opportunity of stating their views, and the
 Local Government Board, under Article 32 of the Application of
 Enactments Order, could, if necessary, direct an inquiry. Once
 the decision of the Viceroy was pronounced, it was final as to all
 initial steps as to the constitution of the new town in point of
 dimensions: sect. 15. If one of the twenty-one signatories was
 found afterwards not to possess the necessary qualification, would
 that invalidate everything done under the Lord Lieutenant's
 or Board's orders under sects 4 and 15? The view that "house-
 holder" in sect. 4 is outside the definition in sect. 15 is open to a
 further objection which has occurred to me since the argument.
 In the definition (as to gender), females are included, save where
 the word "male" is used. "Male" is part of the definition of
 householder. If "householder" in sect. 4 is not within the

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definition, females could apply, with the extraordinary result that in the town, after its area was prescribed, only male householders would come within sects. 14 and 25, though females might be the begetters of the town under sect. 4. Such parthenogenesis in 1854 was certainly not thought of.

There is thus a choice between three possible solutions: (1) women may apply under sect. 4; (2) part of the definition "male" is to apply, but the rest is to be deleted; (3) "prescribed" is to be read as including "proposed to be prescribed." This last is probably most in accordance with the intention of Parliament. In sects. 14 and 25 the householder is associated with occupier, who under the gender clause need not be a man. The only real use for the male qualification is in sect. 4, which is confined to householders, and does not refer to occupiers. To ascertain population, boundaries were desirable if not essential: *Ex parte Kingstown Commissioners* (1) [see sect. 42 of the Act of 1898, with definitions of "town" in sect. 109].

Next, as to the word "town." No town till its boundaries are prescribed can adopt the Act. Assuming that the "town" in sect. 4 is the original town as it existed before the application, what is such town? The definition comprises three elements—(1) There must be something which is the town; (2) the town must have a population of 1500; (3) the population must be ascertained from the last statutory population returns. As in 9 Geo. 4, c. 82, there is no definition as to what the town means, as to extent or otherwise. The term is explained in many cases before and since 1854: *Elliott v. South Devon Railway Co.* (2); *Reg. v. Cottle* (3); *Carrington v. Wycombe Railway Co.* (4); *London & South Western Railway Co. v. Blackmore* (5). A town described in a local Act is capable of growth and enlargement: *Collier v. Worth* (6). Who is to settle the area of the town to which the population test is to be applied? It is said that unless the enumerators, acting under official directions, can decide what the town is as to extent, population returns would be impossible. I cannot agree with this. The Census Act, 1910, does not mention towns at all

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(1) 18 L. R. Ir. 509.

(2) 2 Ex. 725.

(3) 16 Q. B. 412.

(4) L. R. 3 Ch., at p. 383.

(5) L. R. 4 H. L. 610.

(6) 1 Ex. Div. 464.

K. B. Div. (as the Act of 1850 did), and it defines the duties of enumerators
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The Chief Secretary is to issue forms and directions, but has no jurisdiction to confer powers on the enumerators as to defining boundaries. Nor does the English Census Act, 1910, give any such jurisdiction. Sect. 8 makes the certificate of the Registrar-General—no such certificate has been proved—evidence of the population—a provision first found in the Irish Census Act, 1890, and not occurring in the English statute. It is not described as conclusive proof, nor could it be, as to matters not within the competence of the census authorities to determine. The statute of 1854 speaks of “population returns.” From the enumeration of the houses and inhabitants in each allotted district the population could be ascertained within the area over which the particular town extends. The responsibility of determining what the town is rests with the Lord Lieutenant, now the Board, which latter body could direct an inquiry if there was doubt or opposition. Would not the decision on such inquiry be final and conclusive as to the extent of the town and the status of the applicants? Parties who omit the opportunity of controverting are in the same position as if the matter had been actually controverted and decided: *Newington v. Levy* (1). The census officer might misconstrue “town,” as judges have done, and erroneously think it was what was described in previous census returns of 1901, or earlier. A matter so important to the expansion and development of a town cannot be left to the casual impression of an enumerator. It would be absurd that his conclusion should be final, and not subject to certiorari, but that the decision of the Board, whether preceded by inquiry or not, should be subject to judicial review. The extent of the town as an objective fact is beyond the competence of the census authorities to determine and alter. The determination of the Board as to the applicant, town, and householders satisfying the conditions of the definition must be final. It is to be the basis on which proceedings are to be taken forthwith. Sect. 5 so declares. The judgment of Lord Reading in *Ex parte Woodward* (2) discusses the potency of the word “deemed.”

(1) L. R. 6 C. P. 189, 193.

(2) [1917] 1 K. B. 832.

Taking Howth as the actually existing town (not the town fixed by the census-book), there is nothing before us to show that such town had less than 1500 inhabitants. There were twenty-one householders from that town, and indeed from the town described in the census-book. The addition (in the application) of householders outside that town could not invalidate the application made by competent householders. Most statutes relating to population qualification for towns refer to towns with boundaries. A case like the present, where the numbers are defined and the town is not, has not previously arisen. Whether "town" means the proposed town or the original town, the extent of which must be defined in some way before population can be ascertained, the order under sect. 4 is conclusive.

The functions of the Board, in its judicial and administrative capacities, are explained by Lord Justice Holmes in *R. v. Local Government Board* (1) and in *R. v. Local Government Board* (2). On the whole legislation, starting from 9 Geo. 4, c. 82, their position, as transferees of the Lord Lieutenant's duty, seems plainly administrative.

I now turn to sect. 15, which is decisive as to the effect of sect. 4, and must be construed with it. It precludes all objections as to preliminaries under sect. 4, whether in relation to the householders or qualification of the town. For many years full effect has been given to the words "final and conclusive," even in judicial proceedings of inferior tribunals, where formerly judges narrowed their natural meaning. There are many authorities in Stroud on this subject. *R. v. Middlesex Justices* (3) and *Kydd v. Liverpool Watch Committee* (4) are illustrations. The latter was peculiarly strong, as the Court of Appeal had followed the House of Lords' decisions, which were treated by the House as not binding, the point having been overlooked. I need not discuss company cases, such as *Walker v. Smith* (5). The reasoning, however, in *Eustace's Case* (6) appears directly relevant. *Ex parte Ringer* (7), on the Small Holdings Act, 1908, is to the same effect. In *Ex parte the Kingstown Commissioners* (8) the

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(1) [1902] 2 I. R. 349.

(2) 44 I. L. T. R. 176.

(3) [1907] 2 K. B. 581.

(4) [1908] A. C., at p. 330.

(5) 72 L. J. Ch. 572.

(6) 44 I. L. T. R. 176.

(7) 73 J. P. 436.

(8) 18 L. R. Ir. 509.

K. B. Div. Court of Appeal favoured the view of Blackburn J. in *Reg. v.*
 1917. *Hastings Board of Health* (1), that in making provisional orders
 the function of the Board was not judicial. Looking at the
 (N. DUBLIN RURAL COUNCIL) legislation as a whole, from 9 Geo. 4, c. 82, to the statute of 1854,
 in its original and adapted forms, and having regard to the
 v. character of the Lord Lieutenant's and the Board's duty, to be
 L. G. B. acted on at once, and involving permanent and unalterable
 Gibson J. consequences as to rights and liabilities, I must conclude that
 orders under sects. 4 and 15 are made a secure and unassailable
 foundation for township operations, rating, &c. Even if the
 preliminary order could have been attacked in some way, it
 would now be too late to impugn it, where the final order under
 sect. 15 has been made and published. The substitution of the
 Board for the Lord Lieutenant gives extra protection against
 hasty approval, should the proposals be opposed.

The change of the definition of householder (a term which now includes females) does not affect the construction of the Act of 1854 in relation to the topics argued. Why the word "householder" should have been allowed to remain in sect. 4 and sect. 14, the only places where it is now found, is not easy to see. The substance of the definition is produced in sect. 7, which does not use the term "householder" at all. Without any definition the meaning would be the same (sect. 7). The expressions "city and town" and "householder" are taken from the Act 9 Geo. 4, c. 82, where they are not defined. The definition of "town" in sect. 1 makes "city" redundant, as "town" includes "city." Though the adapted Act alters definitions, it continues the Lord Lieutenant as approving authority without any express change, though all Viceregal powers and duties were transferred to the Board by the statute of 1872. The drafting would rather favour the view that, under the statute, the Board were to enjoy analogous immunity in respect of administrative orders. The Scotch Act in force in 1854 was 13 & 14 Vict. c. 33. It, like the Acts of 1892 and 1893, had the same object as our legislation, but is framed so as to avoid the questions now discussed.

Next, as to *Dixon's Case* (2), pressed by Mr. Jellett as a

(1) 6 B. & S. 401.

(2) L. R. Ir. 316.

conclusive authority in his favour—on one point the law there stated must be taken as beyond question, viz., that in certain matters the duty of the Board is judicial and their orders examinable. But I cannot accept the decision as ruling the point in controversy. In the first place, Strandtown, in its original and enlarged dimensions, admittedly did not contain the qualifying population; and the argument of counsel was that any village, however small, could be erected into a town for the purpose of adopting the Act. The points here discussed did not, therefore, require to be determined. Secondly, the questions as to the construction of sects. 4, 5, and 15 were not brought to the attention of the Court. A matter overlooked cannot be regarded as decided, whether the oversight relates to a House of Lords decision—*Reg. v. Blaney* (1)—or to a statute. *Kydd's Case* (2) is a striking example. There the House of Lords disregarded its own previous decisions. The last case on this is *Howley Park Coal Co. v. London and North Western Railway Co.* (3). Thirdly, the case, if taken as deciding that orders of the Board under sects. 4 and 15 were subject to judicial examination, would be opposed to decisions since as to the administrative character and conclusiveness of such orders. So far as it is inconsistent with such decisions, it must be taken to have been overruled. An erroneous decision on a modern statute does not bind, certainly in an Appeal Court: *Hamilton v. Baker* (4); *Re M'Naul's Estate* (5), a conveyancing decision. *Dixon's Case* (6) disposed, without consideration, of the arguments now discussed, and it has not been acted on in the sense contended for by Mr. Jellett, or applied to towns like Howth, with a population exceeding 1500 in its new area, and probably with that population in its original dimensions, if its extent is not to be determined by the unauthorized limitation of the town by the census official.

For all the above reasons, I think the impeachment of the orders of the Board fails.

Lastly, even if there was such departure from prescribed conditions as might make one or other of the orders challenged,

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(1) [1901] 2 I. R., at pp. 103, 104.

(2) [1908] A. C., at p. 330.

(3) [1913] A. C. 11.

(4) 14 A. C., at p. 222.

(5) [1902] I. R. 114.

(6) 2 L. R. 1r. 316.

K. B. Div. considered as judicial acts, open to certiorari, I should hold that, in its discretion, the Court ought to refuse the writ. The applicants have only small, if any, direct interest; they allowed the order of the 17th January, 1916, under sect. 4, to be passed without demanding an antecedent inquiry; proceedings occasioning expense (sect. 9) have been taken on the basis of the order, culminating in an ultimate order under sect. 15. If the application under sect. 4 could have been restrained by prohibition or injunction, or otherwise, no such step was taken. Certiorari is an inconvenient remedy in a case like the present, where a decision adverse to Howth would affect the constitution of other towns. The controversy is one proper to be determined in a plenary suit (with unrestricted right of appeal), for a declaration or injunction: *Eastern Trust Co. v. McKenzie* (1), when terms could be imposed or time given. In certiorari the orders would be quashed outright, and there would be no opportunity of modification or conditions, the orders being set aside as without jurisdiction.

MADDEN J. concurred.

June 18, 19, The prosecutors appealed to the Court of Appeal (2), which
20. affirmed the decision of the King's Bench Division.

Solicitor for the prosecutors: *Laurence J. O'Neill*.

Solicitors for the Local Government Board: *T. T. Mecredy & Sons*.

Solicitors for Local Government electors: *Hunter & Burland*.

C. N. K.

(1) [1915] A. C., at p. 759.

(2) Before SIR IGNATIUS J. O'BRIEN C., and RONAN and MOLONY L.JJ.

THE KING (AT THE PROSECUTION OF JAMES LANDY AND OTHERS) *v.* JAMES A. REDDY, LOCAL GOVERNMENT BOARD AUDITOR (1). K. B. Div.
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20.

Local Government—Rural District Councils—Appointment and Salary of Officers of Council—Control of the Local Government Board—Labourers (Ireland) Act, 1886 (49 & 50 Vict. c. 59)—Local Government (Ireland) Act, 1898 (61 & 62 Vict. c. 37)—Public Health (Ireland) Act, 1878 (41 & 42 Vict. c. 52), s. 11.

The appointment and salary of all officers of rural district councils discharging the general business of those bodies, on the true construction of the Local Government (Ireland) Act, 1898 (61 & 62 Vict. c. 52), s. 11, and the Public Health (Ireland) Act, 1878 (41 & 42 Vict. c. 52), s. 11, are subject to the control and approval of the Local Government Board.

CERTIORARI.

Motion on notice for a conditional order for a writ of certiorari to bring up and quash surcharges made against Lady Martha Russell, Mr. Laurence Mooney, Mr. P. Jordan, Mr. James Casey, and Mr. John Landy, the prosecutors, as members of the South County Rural District Council, by Mr. J. A. Reddy, Local Government Auditor, on the 17th April, 1917.

The surcharges were made in respect of increases to the salaries of three officers of the council. These officers were the clerk of the council, the assistant clerk of the council, and the typist in the clerk's office; and the prosecutors were surcharged as having been the persons authorizing the increases in question, which had all been disapproved of by the Local Government Board for Ireland.

On the 28th November, 1900, the council passed the following resolution:—"That the Local Government Board be requested to sanction the appointment of a clerk to the council, who should devote his whole time to its business; that the clerk to be appointed be a properly qualified civil engineer and architect, capable of preparing plans and specifications for all sanitary

(1) Before GIBSON, MADDEN, and KENNY JJ.

K. B. Div. works and buildings required, in addition to the ordinary duties of
 1917. clerk; the salary to be £200 a year, increasing by annual incre-
R. (LANDY) ments of £10 per annum to £250 a year. The salaries of £20,
v. £10, and £10 paid to assistant clerks to be withdrawn." By
REDDY. minute, dated 7th December, 1900, the Local Government Board
 sanctioned the proposed appointment in the following terms:—
 "Sanction a separate clerk at the salary proposed, £25 a year of
 which is to be paid, as heretofore, in respect of the duties of
 executive sanitary officer." On the 2nd January, 1901, Mr. Byrne,
 who apparently had the required special qualifications, was elected
 as clerk of the council at a salary of £175 a year, with £25 a year
 as executive sanitary officer. In 1910, of a proposed increase of
 £50 a year, the Board only sanctioned £30, and this reduced
 amount was paid as the increase without demur by the council.
 In January, 1911, by various increases sanctioned by the Board,
 Mr. Byrne's salary had increased to £350 a year, with £25 a year
 as executive sanitary officer.

On the 17th July, 1901, the council resolved to appoint a
 Mr. Gallagher as assistant clerk, and in reply to a request for
 their sanction to the appointment, the Board, on the 2nd August,
 1901, wrote stating that the appointment "did not appear to
 require the sanction of the Board." The salary paid to Mr.
 Gallagher was £1 a week. On the 26th July, 1912, Mr. Byrne,
 the clerk of the council, reported to his council that he had
 employed a Miss Keating as typist in the clerk's office at a salary
 of 15s. a week. This appointment was apparently brought before
 the Board for sanction, as on the 7th January, 1914, the secretary
 of the Board wrote to the council as follows:—"I am directed
 by the Local Government Board for Ireland to state for the
 information of the South Dublin Rural District Council that they
 will raise no objection to the positions of assistant clerk, typist,
 and water-rate collector under the council being regarded as
 permanent positions. I am to add that if the holders of these
 positions fulfil the conditions of the Union Officers' Superannuation
 (Ireland) Act, 1865, as applied, the positions might further be
 regarded as pensionable."

From time to time Mr. Gallagher's salary was increased with
 the sanction of the Board. In April, 1910, his salary was £90 a

year; and in February, 1911, on a proposal by the council to increase this salary by £14 a year, the Board suggested that Mr. Gallagher should be appointed registrar of dairies, and that the proposed £14 a year should be paid to him, in addition to his then salary, as the emolument attached to that office. This was done, and Mr. Gallagher's salary as assistant clerk was further increased with the sanction of the Board, in 1911, to £120 a year, and in December, 1913, to £130 a year.

On the 17th December, 1913, the council passed the following resolution:—"After due consideration of the applications, the following increases to be allowed:—Miss Keating, typist, salary to be increased to 17s. 6d. a week; Mr. Gallagher, assistant clerk to council, salary to be increased by £10 a year; Mr. T.J. Byrne, clerk to the council, salary to be increased by £50, on account of increased work and responsibility." On receipt of the minute of this resolution, correspondence took place between the Board and council relative to the Board's sanction to the increases, and on the 1st June, 1915, the Board by letter sanctioned the increase of £10 per annum to Mr. Gallagher and of £6 10s. to Miss Keating, but refused to sanction to Mr. Byrne, the clerk, more than an increase of £30 a year. In reply to this letter, the council, on the 7th July, 1915, sent to the Board a letter dealing with the increased duties thrown on Mr. Byrne, and enclosing a list of the development of the council's duties since 1901. By their reply of the 30th July, 1915, the Board refused to alter their decision as to the proposed increase, and on the 29th December, 1915, the council by resolution confirmed the "balance of £20 of the £50 increase in salary granted in December, 1913, to Mr. Byrne, clerk and surveyor to the council, and executive sanitary officer," and ordered that the salary of Mr. Gallagher, assistant clerk, should be increased by £10 a year to £140 a year, and that of Miss Keating by £6 10s. to £52 a year. On the 4th February, 1916, with the minute of this resolution before them, the Board wrote to the council stating that they "must decline to re-open the consideration of these officers' emoluments which were settled last year."

On the 23rd February, 1916, the council adopted the following resolution:—"It is hereby ordered: 1. That the salary attaching

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K. B. Div. to the office of clerk of this council be apportioned as follows:—
 1917. executive sanitary officer £25 a year; clerk of burial board £15
R. (LANDY) a year; clerk of council £200 a year: total £240. 2. That the
v. difference (£165) between the total and £405, his present salary, be
REDDY. deemed to be the present salary attached to the office of surveyor
 to the council. 3. That the difference between the increase of
 Mr. Byrne's salary agreed to by the council in December, 1913,
 of £50 per annum and the amount sanctioned by the Board, on
 the 1st June, 1915, £30, viz., £20 be now granted to him as an
 addition to his salary as surveyor to the council, making that
 salary £185 a year. With reference to the increase of salary
 granted by the council in December, 1915, to the holders of the
 offices of assistant clerk and typist, viz., £10 and £6 10s. respec-
 tively, as the Local Government Board have not stated under
 what authority they purport to sanction such increases, it is
 hereby ordered that the said increases of £10 a year to
 Mr. Gallagher, assistant clerk, and £6 10s. to Miss Keating,
 typist, be paid as from the 1st March, 1916."

On the 20th March, 1916, the assistant secretary of the Local Government Board wrote to the council as follows:—"The Local Government Board for Ireland have had before them the resolution of the South Dublin Rural District Council of the 23rd ultimo, proposing to increase the salaries of their clerk, assistant clerk, and typist. With reference thereto, I am to state that the power of the rural district council to appoint, employ, and pay officers is governed by the Local Government (Ireland) Acts, the Public Health (Ireland) Acts, the Labourers (Ireland) Acts, and Acts incorporated therewith. The covering authority of the Local Government Board is required in such cases; and if the council decide to make the payments now proposed, they must do so on their own responsibility." The council resolved to continue, and did continue, the increases as stated in the resolution of the 23rd February, 1916.

On the 17th April, 1917, on audit of the accounts of the council, Mr. Reddy, the Local Government Board auditor, made surcharges against the prosecutors in respect of four sums of £3 6s. 8d., £10 10s., £5, and £3 5s., for payments covering a period of six months, and representing the increases of salary

granted by the council of £20 a year to Mr. Byrne, clerk of the council; £10 a year to Mr. Gallagher, assistant clerk; and £6 10s. a year to Miss Keating, typist. The surcharges were made on the ground that the approval of the Local Government Board to these increases was required by law, and that, when applied to, the Board had definitely refused their sanction.

Pursuant to an order of the Court, dated 5th June, 1917, the prosecutors served on Mr. Reddy and the Local Government Board notice of motion for an application for a conditional order of certiorari to bring up and quash these surcharges and the grounds for making the same. The grounds alleged in the notice were that the surcharges were made without and in excess of jurisdiction, and that the reasons for making the same stated by the auditor were erroneous in point of law.

The evidence before the Court on the hearing of the application consisted of the affidavits of the prosecutors, grounding the motion and the exhibits referred to therein.

The following are the material portions of the statutes referred to in the argument and judgments:—

Public Health (Ireland) Act, 1878 (41 & 42 Vict. c. 52).

S. 11. Every medical officer of a dispensary district shall be a sanitary officer of such district . . . with such additional salary as the sanitary authority thereof may determine with the approval of the Local Government Board; and every sanitary authority, whether urban or rural, shall appoint such other sanitary officers . . . as the Local Government Board shall in each case direct, with such salaries or additional salaries as the said sanitary authority shall determine, with the approval of the Local Government Board. . . . Every such salary or additional salary so determined or approved shall be payable from such local fund as the Local Government Board shall indicate as properly chargeable therewith.

Local Government (Ireland) Act, 1898 (61 & 62 Vict. c. 37).

S. 22. (2) For every rural sanitary district there shall be a rural district council, whose district shall be called a rural district.

S. 32. There shall be transferred to every urban and rural district council the business of the board of guardians under section 150 of the Public Health Act, 1878 (which relates to the execution of the regulations made when Ireland appears to be threatened by any formidable epidemic, endemic, or infectious disease), or under any enactment amending or extending that section, and section 8 of the Epidemic and Other Diseases Prevention Act, 1883 (46 & 47 Vict. c. 59), shall be repealed.

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S. 33. (1) There shall be transferred to the district council of every rural district the business of the rural sanitary authority in the district.

(2) Rural district councils shall also have such powers and duties of urban sanitary authorities under the Public Health Acts or any other Act, and such provisions of any of those Acts relating to urban districts shall apply to rural districts as the Local Government Board by general order direct.

S. 72. (1) Any council, board, or court shall, as respects the business by this Act transferred to them from any authority, be subject to the provisions and limitations affecting them, whether in this Act or in any Order in Council made under Part 6 of this Act, but, save as aforesaid, shall have all the powers and duties of the authority in respect of the business transferred.

(2) There shall be transferred to the county and district council respectively, in relation to any business transferred to that council, all the powers and duties under any Act of any officer of such council other than the treasurer in relation to that business.

S. 83. (1) As respects the officers of the county council, the council of a county other than a county borough, subject to the provisions hereinafter contained, (a) shall appoint the secretary of the council (who shall act as clerk of the council), the treasurer of the county (who shall be treasurer of the council), and the county surveyor or surveyors, and (b) may appoint such assistant surveyors and such further officers as they may think necessary for the performance of the duties of the council, and every officer so appointed shall perform such duties, and subject (in case of any officer whose salary can be fixed without the concurrence of the Local Government Board) to any statutory limits, be paid such remuneration as the council may assign to him.

(6) Save as otherwise provided by this Act, the county council may remove any of their officers.

(11) The enactments relating to the superannuation of officers of boards of guardians shall, with the necessary modifications, apply to officers of county and rural district councils other than the county surveyor and any officer of a county borough, and the amount of any such superannuation shall be paid as expenses of the county or district council.

(14) This section shall be without prejudice to the provisions of this Act respecting existing officers.

S. 85. (1) The clerk or treasurer of the union shall be the clerk or treasurer of the council of every rural district comprised in the union, except where the Local Government Board authorise such council to appoint a separate clerk or treasurer, in which case the council may appoint a clerk or treasurer, and in the case of the clerk with such salary as the Board approve.

S. 109. In this Act, unless the context otherwise requires, the expression "powers" includes rights, jurisdiction, capacities, privileges, and immunities; the expression "duties" includes responsibilities and obligations; the expression "office" includes any office, situation, or employment, and the expression "officer" shall be construed accordingly.

Local Government (Application of Enactments) Order, 1898— *K. B. Div.*
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Article 13. (1) Every council . . . for a rural district . . . shall be a body corporate by the name of the rural district council with the addition of the name of the district. , *R. (LANDY)*
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Article 33. All enactments in any Act . . . relating to any business, powers, duties, or liabilities transferred by or in pursuance of the Act from any authority to a . . . rural district council . . . shall, subject to the provisions of the Act, and so far as circumstances admit, be construed as if . . . (b) a reference to any clerk or officer of such authority referred to the secretary, clerk, or officer of a . . . district council.

Labourers (Ireland) Act, 1886 (49 & 50 Vict. c. 59).

S. 8. (3) A sanitary officer shall be entitled to be remunerated for any duty performed by him under this Act, according to a scale to be fixed by the sanitary authority, with the approval of the Local Government Board.,

S. 17. Any officer or person appointed to any office or place under this Act or under the said Acts may be removed from such office or place by the Local Government Board for Ireland.

Under the Labourers (Ireland) Order, 1906, article 46, a scale for remuneration of the clerk of a council for services in connexion with the making and execution of an improvement scheme is provided. Payment on this scale is made subject to the approval of the Local Government Board. Article 51 empowers the council to employ and remunerate a competent person as architect, engineer, or surveyor for the purposes of an improvement scheme.

Godfrey Fetherstonhaugh K.C. (with him *W. Shannon*), for the prosecutors :—

The Local Government (Ireland) Act, 1898 (61 & 62 Vict. c. 37), as regards the officers to be appointed by district councils, only makes express provision as to the clerk (sect. 35). No doubt Mr. Byrne's salary as clerk is subject to the control of the Board ; but his duty as an officer of the council is not confined to that of clerk only. Besides being executive sanitary officer and clerk to the burial board, he acts as the council's surveyor. Admitting that his salary as executive sanitary officer and as clerk to the burial board comes within the provisions of the Public Health (Ireland) Act, 1878 (41 & 42 Vict. c. 52), there is no statutory provision regulating his salary as surveyor, and that must be

K. B. Div. under the control of the council. Under article 51 of the
 1917. Labourers (Ireland) Order, 1906, the council could appoint a com-
R. (LANDY) petent person as architect or surveyor in connexion with
v. improvement schemes. The Board, when Mr. Gallagher was
REDDY. appointed, stated that his appointment did not appear to require
 their sanction. The council is made a corporate body (Local
 Government Application of Enactments Order, 1898, Schedule,
 article 13), and as such has all the powers of a corporation as
 regards the appointment and salary of officers.

Wylie K.C. and *Overend*, for the Local Government Board :—

Up to the present the sanction of the Board has always been required: the Board when intimating that the appointment of Mr. Gallagher did not appear to require sanction probably considered the appointment was only to a temporary office. The district councils were not new bodies in 1898, like the county councils: they represented composites of old bodies whose business and officials were transferred to the district councils (Local Government (Ireland) Act, 1898 (61 & 62 Vict. c. 37), ss. 72, 85, and 115). It is quite clear that the appointment and salary of the clerk are subject to the control of the Board (sect. 85), and that is the post to which Mr. Byrne was appointed by the resolution of the council. The provisions of sect. 11 of the Public Health (Ireland) Act, 1878 (41 & 42 Vict. c. 52), give the Board the control of the salaries of all sanitary officers, and that section extends to all future as well as present sanitary legislation: *Rogers v. Youghal Union* (1); *M'Hugh v. Athy Union* (2). The Labourers (Ireland) Act, 1886 (49 & 50 Vict. c. 59), s. 8, specially provides for the control of the Board. The work done by Mr. Byrne under the Labourers Act was done by him as clerk and not as surveyor; he was never, in fact, appointed to that office. The assistant clerk and typist are sanitary officers, and as such their appointment and salaries are under the control of the Board.

W. Gibson K.C. and *Wood*, for the auditor :—

It is admitted that the appointment and salary of the clerk are subject to the control of the Board: it has not been shown, and, it is submitted, could not be shown, that the assistant clerk

(1) 16 L. R. Ir. 79.

(2) [1898] 2 Q. B. 358.

and typist had duties other than those of the clerk whose work they did, except whatever duties Mr. Gallagher discharges as registrar of dairies. The assistant clerk and typist are officials in the clerk's office, subordinate to him, and aiding him in the execution of duties of an office, appointment to and salary of which are admittedly controlled by the Board. It is a startling proposition that while the clerk's salary is to be controlled by the Board, the salaries of his subordinates discharging his duties should be left entirely to the discretion of the council.

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W. Shannon, in reply:—

No statutory provision expressly conferring control over salaries of officers, other than the sanitary officers proper or clerks of councils, has been cited to support the argument for interfering with the power of the council as a corporation to appoint its own officers and to regulate their salaries subject to the control of the electorate. The view put forward by counsel for the auditor and the Board leads to a manifest absurdity, for it would follow from their proposition that the sanction of the Board would be required for every appointment, even for temporary appointments, such as scavengers and charwomen, or appointments on a sudden emergency.

Cur. adv. vult.

GIBSON J.:—

I regret that the important questions raised in this application for a certiorari, in which the established practice of the Local Government Board for many years is sought to be reversed as erroneous and without jurisdiction, have not been raised in an action of the type illustrated by *Lawson v. Marlborough Union* (1); *Eastern Trust Co. v. McKenzie, Mason, & Co., Ltd.* (2), when on evidence and facts fully before the Court the controversy could be finally determined. The exact duties of the assistant clerk and typist are not proved, and we must collect these duties from the description of their respective offices and inferences from the terms of their appointments and from correspondence. The surcharges challenged relate to increases in the pay of three

(1) [1912] 2 Ch. 154.

(2) [1915] A. C., at p. 759.

K. B. Div. permanent officers of the council, £20 a year for Mr. Byrne, the clerk, £10 a year for Mr. Gallagher, assistant clerk, and 2s. 6d. a week for Miss Keating, the typist; which it is said were improper, not having been authorized by the Local Government Board, which when applied to refused to sanction them.

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The position of the clerk differs from that of the other two officials employed in his office. He was appointed under sect. 85 of the Act of 1898, under the authority of the Local Government Board, the resolution of the council, dated the 28th November, 1900, stating that the clerk to be appointed should be a properly qualified civil engineer and architect, capable of preparing plans and specifications for all sanitary works and buildings in addition to the ordinary duties of clerk: the salary to be £200 a year, rising by annual increments of £10 a year to £250 a year, and the salaries of £20, £10, and £10, paid to assistant clerks to be withdrawn. No explanation as to these latter officials or their duties is before us. On the 7th December, 1900, the appointment of the separate clerk was sanctioned at the salary proposed, of which £25 was to be paid, as theretofore, in respect of the duties of executive sanitary officer. Mr. Landy's affidavit as to the nature of Mr. Byrne's appointment is rather misleading. There is no document corresponding to his description of the appointment of Mr. Byrne or his duties. Mr. Byrne's salary on January 11th, 1911, was increased to £350, with £25 as executive sanitary officer, with the sanction of the board. This increase of salary and the approval of the board are not disputed, but the resolution of the council and sanction of the board are not verified by any exhibits or proof. On December 17th, 1913, the council allowed three increases. Miss Keating, the typist, from 15s. to 17s. 6d. a week, Mr. Gallagher, assistant clerk to the council, £10 a year, Mr. Byrne, clerk of the council, salary to be increased by £50 on account of increased work and responsibility. By letter dated 1st June, 1915, the board sanctioned the proposed increases to Mr. Gallagher and Miss Keating, but limited their sanction in Mr. Byrne's case to £30 a year. I abstain from discussing the merits of the controversy between the council and the Board. If either were acting within their jurisdiction, this Court has no authority to control them or express any opinion on the way that

jurisdiction was exercised. On July 30th, 1915, the board wrote adhering to their decision. The council, on December 29th, 1915, confirmed the balance of £20 (of the £50 increase granted to Mr. Byrne, clerk and surveyor to the council and executive sanitary officer) and £10 a year increase to Mr. Gallagher, assistant clerk and registrar of dairies, and Miss Keating's salary was increased to £52 a year. On the 4th February, 1916, the Board, with this resolution before them, declined to re-open their decision. On the 23rd December, the council proceeded to allocate the salary attaching to the office of clerk as follows:—£25, executive sanitary officer; clerk to burial board, £15; clerk to council £200; total £240; that the difference, £165, between that total and his then present salary, £405, be deemed to be the present salary attached to the office of surveyor to the council; and that the £20 difference between the amount sanctioned by the Board on the 1st June, 1915, and the £50 agreed to by the council, be granted to him as an addition to his salary as surveyor to the council, making that salary £185 a year. The increases of £10 and £6 10s. to Mr. Gallagher and Miss Keating were ordered to be paid as from the 1st March, 1916.

The increase of duties devolving on Mr. Byrne, set out in the list contained in the council's letter of July 7th, 1915, relate chiefly if not altogether to the Labourers Acts, and Public Health Acts. Salary in respect of such duties requires the approval of the Local Government Board.

The initial approval by the Board to a separate clerk at the proposed salary was on the basis that the clerk was to do many of the duties now sought to be detached from his office and to be attributed to a new office, that of surveyor. The council had no right to subtract from the office and salary sanctioned by the Board. To do so would alter the nature of the office and the pay. The course adopted looks like a contrivance to evade the control of the Board. Reading the Labourers Act, 1886, sect. 8, sub-s. 2, and the Public Health Act, 1878, sect. 11, I am of opinion that the sanction of the Board was a requisite to permanently paid employment to discharge these respective duties. I am also of opinion that the course now proposed is in contradiction with the terms on which the office was created under sect. 85

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K. B. Div. of the Act of 1898 and the approval of the Board obtained. The
 1917. case as to Mr. Byrne's increase of salary, therefore, fails.

R. (LANDY) The position of the other officers is more difficult. Mr.
v. Gallagher was appointed assistant clerk in July, 1901, but the
REDDY. resolution appointing him is not among the exhibits. It is said
 Gibson J. that it described a permanent office. The salary was £1 a week.
 On August 2nd, 1901, having the minutes before them, the Board
 stated that the appointment did not appear to require the sanction
 of the Board. Counsel explained this by suggesting that the
 appointment was regarded as temporary only; if so the Board
 may have misread or overlooked the terms of the resolution.
 The salary was afterwards treated as subject to the approval of
 the Board, for it was raised on several occasions with the sanction
 of the Board, amounting, in December 17th, 1913, to £130. The
 resolutions and approvals as to the various increases up to June,
 1911, are not before us. The £10 increase now in question would
 make the salary £140. Miss Keating was made typist in 1912,
 at 15s. a week; this was raised with the sanction of the Board to
 17s. 6d. a week. The increase now questioned is to £1 a week.
 Both Mr. Gallagher and Miss Keating are now permanent officers
 with rights to pensions.

Mr. Fetherstonhaugh and Mr. Shannon contend that the
 council as a corporation have an implied capacity to employ
 officials to enable them to perform their functions; that, as
 to number of such employees and their remuneration, they have
 uncontrolled discretion, unless the legislation contains some
 restrictions; that there is no such legislation applicable to these
 subordinate officers.

Counsel for the Board and for the auditor reply that the
 practice of the Board is right; that all permanent officers are
 pensionable; that subordinate officers in the clerk's office are,
 like the clerk, subject to the control of the Board, at least as
 regards salary, so far as relates to all duties within the Sanitary
 and Labourers Acts.

The Local Government Act, sect. 22, makes the rural sanitary
 district the area to be represented by the rural district council, and
 it might be expected that its officers should be subject to the
 same kind of control as sanitary officers proper. Its functions

comprise roads (sect. 27); certain sanitary powers of guardians (sect. 32). Sect. 33 transfers to the rural council the business of the rural sanitary authority, its main business, as well as roads. The Local Government Act is silent as to any express restrictions upon rural councils in respect of officers and their salaries, and any such restrictions must be found under sect. 72 in the limitations affecting the transferred business.

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Before the statute of 1898 there were three principal codes relating to transferred business. All of them use the word "officers" without any such definition as is supplied by sect. 109 of the Act of 1898.

The first code is contained in the poor law legislation and orders thereunder, summarized in the *South Dublin Union Case* (1), which contemplate employment—permanent, temporary, or on sudden emergency. The classes of officers under the Poor Law Acts are defined by the orders. Sect. 28 of the Act of 1898 transfers to the urban district councils the business of guardians as to poor rates; and all officials engaged in such business, under sect. 72, would be subject to the provisions restricting the powers of the guardians, if the council were at liberty to employ separately such officials, of whatever grade. It may have been intended that urban councils should resort to the services of their business staff. See sect. 85 as to rural councils. The only power of guardians transferred to urban and rural councils alike is, under sect. 32, as to the duties created by sect. 150 of the Public Health Act, 1878. Officers discharging that duty would seem to be subject to the limitations of the Poor Law Code. So far as the clerk, assistant clerk, and typist might be liable to perform that class of work the Poor Law Code might apply to them.

The main argument of Mr. Wylie was founded on sect. 11 of the Public Health Act, 1878, and the Labourers Acts, a branch of the same legislation. These statutes, like the Poor Law Acts, only speak of "officers," but, unlike the latter statutes, are not accompanied or followed by orders defining the various degrees or classes of officers intended to be affected. In this respect they differ from the English Public Health Act, 1875, sects. 189 to 196. I think, however, that sect. 11 of our Act, though it

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only mentions "other sanitary officers," cannot be construed as having a substantially less operation than the English enactment, and that it should be read as comprehending all classes of sanitary officers, high and low. It is unfortunate that no general order, comprehending all officers, has been made by the Board. Each case is left, as it arises, to the decision of the Board. The Labourers Act, 1886, sect. 8, sub-s. 2, contains special provisions as to the particular sanitary officers therein mentioned. Sect. 11 applies to all future, as well as present, sanitary legislation, in the opinion of Palles C.B., whether such legislation deals with sanitation strictly, or matters deemed to relate to public health and comfort, like the Labourers Acts. If the clerk is such sanitary officer, as in most of his functions he must be (including the limited duty created by sect. 32 of the Act of 1898), I am of opinion that his assistant clerk and typist, engaged permanently in the work of his office, must, though subordinates, come within sect. 11.

The salaries were increased in respect of the entire offices held, and the duties attached thereto. As in the case of the clerk, so far as such duties represent employment in a character requiring sanction by the Board, it would seem that the pay of the officer is subject to such sanction. If the clerk is subject to control, it would be reasonable that his subordinates should be subject to the same controlling authority. It was urged that, on Mr. Wylie's view, sanction would be required for temporary employees, even scavengers and charwomen. Such cases must be left to practical good sense, and hitherto no difficulty has arisen. I fail to see, whatever be the position of such temporary servants, that it can affect the position of permanent officials with pensionable rights, which, if their appointment and salary were lawful, could not be legitimately denied by the Board on the illegal ground that they disapproved of the appointment or salary—matters, *ex hypothesi*, outside their jurisdiction.

Why the statute of 1898 is silent as to officers of district councils I do not know; whether it was assumed that such councils, representing the local sanitary authority, were subject to the restrictions, and it would be undesirable to provoke unnecessary debates as to their powers, or otherwise. The 85th section deals

with a separate appointment of an exceptional kind. If the clerk of the Union had been the clerk of the district council, he and the staff in his office would apparently be subject to the control of the Board as regards office and salary. The statute does not displace such control where it applies, and I do not think that it gives the district council a free hand in creating pensionable offices, representing, in whole or in part, work of officials subject to the jurisdiction of the Board as to salary.

The application must be dismissed with costs as regards the auditor. The Board will abide their own costs, though they were right in being represented by counsel independently.

MADDEN J. :—I concur.

KENNY J. :—

The proposition put forward on behalf of the members of this rural district council, who have been surcharged by the Local Government Board auditor, is one of very wide scope, and raises a question of considerable importance to bodies that have been brought into existence by the Irish Local Government Act of 1898. If it be regarded as one of substance, it is surprising that during the nineteen years the Act has been in force it does not appear even to have been raised, at least in any contentious form—nay, more, so far as the district council in the present case is concerned, the authority of the Local Government Board, which is now challenged, has been accepted and acquiesced in on numerous occasions, involving circumstances almost identical with the present.

The broad contention is that rural district councils have a right to the appointment of all officers of the council, uncontrolled by the Local Government Board, with the correlative power of fixing and, if desirable, of increasing their salaries, unfettered by any such control. The Local Government Board contend that all appointments of officers of a rural district council and the amounts of their salaries must, on the construction of the Act, be subject to their approval.

The present surcharge deals with increases of salaries to three officials of the district council, namely, the clerk, the assistant clerk, and the typist in the clerk's office. The clerk, Mr. Byrne,

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K. B. Div. was appointed in 1900, the assistant clerk in 1901, and the typist in 1912; and while it may well be that they are all admirable officials, and have had increasing duties cast upon them, the clerk especially, it is not unimportant to note that they have all received considerable increases of salary from time to time, and that these increases have been the subject of official approval by the Local Government Board. The clerk, who, in 1900, was appointed at a salary of £175, has now £350, in addition to £25 a year as executive sanitary officer; the assistant clerk has risen from £50 a year to £130, together with £14 for some other services; and the typist from 15s. a week to 17s. 6d. The council now propose to further increase the clerk's salary by £50, the assistant clerk's by £10, and the typist's by an additional 2s. 6d. a week. The Local Government Board are willing to give their approval to an increase of £30 to the clerk, but they decline to sanction the proposed increases in the other cases.

The question is: Are these increases valid without their approval?

As to the clerk, the council take up the position that they are entitled to segregate his salary, and by a resolution of the 23rd February, 1916, they have taken upon themselves to do so by allocating £25 in respect of his duties as executive sanitary officer, £15 in respect of the clerkship of the burial board, and £165 as surveyor to the council. Having purported to make that segregation, they proceed to allocate the £20 increase that is in controversy, not to the clerk's salary, but as an addition to the £165, which they say he receives as surveyor. This is plainly an artifice. Even if the council were entitled to segregate the salary as they have done, there was no segregation up to February, 1916, and down to the latter date the clerk's salary was £350 and £25 as executive sanitary officer. The affidavit in support of the order for certiorari asserts that Mr. Byrne was appointed as "clerk and surveyor" to the council. I can find no warrant for this statement. The resolution of the 28th November, 1900, of the district council asking for the approval of the Local Government Board to his appointment refers to the position as "clerk" to the council; and the sanction of the Local Government Board, on the 7th December, 1900, is in terms limited to the office of clerk.

No doubt, the council proposed that the clerk should be a gentleman with the qualifications of a civil engineer, and I would gather Mr. Byrne fulfilled that condition, but the Local Government Board never approved of his appointment as "surveyor."

The general question then arises: has the council unrestricted power over the appointment of officers and their salaries? So far as the clerk is concerned, there can be no doubt that Mr. Byrne was appointed as clerk and nothing else, and it can make no difference that he possesses the qualifications of a civil engineer; and I assume that it is as a clerk that he has from time to time received his increases of salary. The resolution by which the district council have thought to justify the further increase by referring it to an office which apparently Mr. Byrne never held namely, surveyor to the council, and not to the clerkship, is too obviously a device for attempting to evade the provisions of the statute. The 85th section of the Local Government Act is distinct, that where the Local Government Board authorizes a district council to appoint a separate clerk the council may accordingly make the appointment "with such salary as that Board shall approve." The control given by that section is not, in my judgment, confined to the initial salary on which the clerk starts, but extends to every subsequent alteration of it. It would be absurd to say that after the council had fixed the salary, and the Local Government Board had intimated its assent, a complete change could be arbitrarily effected the next day by a resolution of the appointing body.

In the case of the assistant clerk and typist, the argument for the uncontrolled power of increase rests on the proposition that, with the exception of the clerk and treasurer, the district council are entitled, without the approval of the Local Government Board, to appoint all such officers as they may consider necessary for the conduct of their business, and to fix their salaries. This exclusion of control is claimed from two points of view. First, it is said that as the council has been created a corporation (Art. 13 of the Local Government Applications of Enactments Order, 1898), it must have all the incidental rights and powers of a corporate body, including that of the appointment of its officers and the fixing of their salaries. But a district council is not by the Local

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K. B. Div. Government Act constituted a corporation for all purposes, but, 1917. * as it seems to me, only for the special purposes of the business which the Act transfers to the council, and with the powers and duties of the transferred bodies and none other. The scope and purpose of the Act were to transfer to the county council the more important business of the county, namely, that of the grand jury (sect. 4), with such rights and duties as were associated with that body, while at the same time subordinate business, such as that of the baronial presentment sessions (sect. 27), and of the rural sanitary authority (sect. 33), was transferred to the rural district council. The nature of these rights and duties is not left in any doubt. The Act is careful to prescribe, by the 72nd section, that a council is to have all the powers and duties of the bodies whose business is transferred to it. Why should such a provision be introduced if the council as a corporate body was to have other rights and duties deriving their source from the mere fact of incorporation? A corporation may be established with general rights and powers, or with restricted and curtailed rights and powers, and, in my opinion, where a statute in effect prescribes what the latter are to be, we cannot look outside it in order to justify the exercise of others. It is a significant fact, standing in marked contrast to the section dealing with the district council, that when the Legislature desired to give unrestricted power to appoint officers in the case of the county council, it did so in clear language (sect. 83).

The other point of view from which exclusion of control is claimed is, that it is to be found in the constitution and practice of the authorities whose business has been transferred to the district council; but it seems to me that so far from its being possible to say that these authorities were free from the control of the Local Government Board in the exercise of their powers the statutes which govern them are permeated with the authority of the Local Government Board, and the industry of counsel has not resulted in our being referred to a single section in which uncontrolled power, such as the council insist on, is expressly conferred or impliedly recognized.

An additional argument against the district council is afforded by the circumstance of the positions of the assistant clerk and

typist. Both have been appointed as officials in the clerk's office; both are his assistants; both perform duties which, prima facie, would come within the purview of his work. The appointments have been recognized by the Local Government Board as permanent and possibly pensionable, and in these circumstances it would, in my opinion, be unreasonable to conclude that the Legislature intended to give the council a freer hand in dealing with subordinate officers of the clerk than with the clerk himself.

In my opinion, the application for a conditional order ought to be refused.

Solicitors for the prosecutors: *William J. Shannon & Co.*

Solicitors for the auditor and the Local Government Board:

T. T. Mccredy & Son.

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K. B. Div. 1917. HAYES v. COUNTY COUNCIL OF KING'S COUNTY (1).

April 18.
May 15.

Public Authorities' Protection—Limitation—Cause of Action—Contract with private individual—Public Authorities Protection Act, 1893 (56 & 57 Vict. c. 61), sect. 1 (a).

The defendants, who were a road authority, erected a stone-crusher near a quarry for the purpose of obtaining road materials. They hired H. and his mare to draw waggon-loads of stones from the quarry to the crusher, and while engaged in this work the mare was fatally injured.

More than six months after the date of the accident H.'s administratrix commenced proceedings against the defendants to recover damages for the loss of the mare.

Held, that the Public Authorities Protection Act, 1893, did not afford a defence to the proceedings: per Campbell C.J., because that Act does not extend to private duties or obligations arising out of contracts with particular individuals: per Madden J., because the Act does not apply to a case where it was at the option of the public authority either to make or to refuse to make the particular contract out of which the cause of action arose: per Gordon J., because the cause of action did not arise in the direct execution by the defendants of any statute, or in the discharge of a public duty owed by them to all the public alike, or in the discharge of a public authority exercised by them impartially with regard to all the public.

Sharphington v. Fulham Guardians, [1904] 2 Ch. 449, and *Bradford Corporation v. Myers*, [1916] 1 A. C. 242, applied.

SPECIAL CASE stated, pursuant to the provisions of sect. 35 of the Civil Bill Courts Procedure Amendment Act (Ireland), 1864 (27 & 28 Vict. c. 99), for the opinion of the King's Bench Division, by Ronan L.J., sitting as judge of assize at the Spring Assizes, 1917, for the King's County.

The case set out as follows:—

"1. The only question in this case is whether the Public Authorities Protection Act, 1893 (56 & 57 Vict. c. 61), constitutes on the facts a valid defence to the plaintiff's action.

"2. The plaintiff is the sister and administratrix of John Hayes, deceased, and sues the defendants for £20 damages, being the value of a mare the property of the said John Hayes, deceased, alleged to have been injured through the negligence of the

(1) Before SIR JAMES CAMPBELL C.J., and MADDEN and GORDON JJ.

defendants, their servants or agents, at Ballaghmore, in the said county, on the 19th of August, 1915. The date of the civil bill process is the 9th of March, 1916, more than six months after the accident. The County Court Judge gave a decree for £20.

"3. The injuries sustained by the mare were such that she had to be destroyed, and no question was raised as regards the amount of the decree. The case was heard before me at Tullamore, and was subsequently argued in Dublin. Subject to the defence of the Public Authorities Protection Act, 1893, I held the plaintiff entitled to recover.

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"4. The following facts were proved at the hearing:—

"(a) The defendants, in pursuance of their statutory duties as road authority and for the purpose of obtaining road materials, had a stone-crusher erected near a quarry at Ballaghmore. The stones were brought to the crusher in small waggons or trucks, which ran along a double line of railway, which had been roughly laid down between the quarry and the crusher.

"(b) The empty trucks ran down into the quarry by the force of gravitation, and when loaded they had to be dragged back again along the railway to the crusher, a horse being attached to the waggon for this purpose. The two lines of railway were close together, the inside rail of the one line being separated from the nearest rail of the other line by a space of four inches.

"(c) Hayes and his mare were hired by the defendants at the sum of 6s. per day, and his duty was to yoke the mare to a loaded waggon, lead the mare and waggon along between the rails to the appointed place, and then unyoke the mare and bring her back again to draw up another waggon.

"(d) Hayes started at his work on the 30th of June, and he worked intermittently thereat until his mare was injured on the 19th of August.

"(e) On that day, as Hayes was turning his mare when she was between the two lines of railway, one of her feet was caught under one of the rails, and she was thrown down. Her hip was broken by the fall; and in consequence of the injuries she so received she had to be destroyed on the following day. At the place where the occurrence took place the rails were not pegged down to the ground in any way, nor were they ballasted.

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"(f) The operations at the quarry and stone-crusher were being carried on under the general supervision of J. F. O'Sullivan, the county surveyor.

"5. *Leonard*, for the defendants, submitted that on two grounds the defendants were not liable. The first of these is not now material. The second contention relied upon by the defendants was that the Public Authorities Protection Act, 1893, was a valid defence to the plaintiff's action; and that the action was not maintainable, inasmuch as it was not instituted within six months after the act, neglect, or default complained of.

"6. *Shannon*, for the plaintiff, relied on the decision and judgments in *Bradford Corporation v. Myers* (1), and contended that inasmuch as the duty, for the neglect of which the defendants were sought to be made liable, was a duty towards Hayes imposed upon them by a private contract with him, and was not a duty towards the public generally, the Public Authorities Protection Act, 1893, afforded no defence for the defendants.

"7. The defendants referred to *The King (Westropp) v. Clare County Council* (2), sects. 12, 82, sub-s. 1, and 109 of the Local Government (Ireland) Act, 1898 (61 & 62 Vict. c. 37), sect. 162 of the Grand Jury (Ireland) Act, 1836 (6 & 7 Wm. 4, c. 116), and the following articles, viz.:—22, 24 (1), 25 (2), 25 (5), 25A and 32 of the Local Government (Procedure of Councils) Order, 1899, as amended by the Local Government (Procedure of Councils) Orders, 1901 and 1905, in support of the proposition that there was a direct statutory duty upon the defendants to repair their roads in one or other of the alternative methods provided for by said articles. The defendants contended that the neglect complained of in the present case arose in the course of the direct execution of their public duties.

"8. In view of the importance of the point raised to public bodies generally, I agreed at the request of the defendants, and without expressing any opinion on the point raised, to state, and I now accordingly state, this case for the King's Bench Division, upon the one point as to whether the Public Authorities Protection Act, 1893, is a valid defence to the action upon the facts stated.

"9. If the Public Authorities Protection Act, 1893, is a valid

(1) [1916] 1 A. C. 242.

(2) [1904] 2 I. R. 569.

defence to the plaintiff's action, the decree of the County Court Judge is to be reversed, and the Civil Bill dismissed on the merits with costs in the County Court and costs of the appeal.

"If the Public Authorities Protection Act, 1893, is not such a valid defence, the decree for £20 is to be affirmed, with £2 9s. costs, and £1 10s. witnesses' expenses in the County Court, and costs and witnesses' expenses on the appeal.

"The defendants have agreed that, in any event, they will pay the plaintiff's costs of the hearing of this case stated in the King's Bench Division, and (if an appeal be taken) in the Court of Appeal, the last-mentioned costs being limited to £10."

Leonard, for the defendants:—

In procuring the stones for the repair of the roads the defendants were acting under the provisions of Article 25 (A) of the Local Government (Procedure of Councils) Order, 1899. I submit that the negligence of which the defendants were guilty was a neglect or default in the direct execution of an Act of Parliament, and in the direct execution of their public duty to provide materials for the upkeep of the roads, and so was such a neglect or default as is within the protection of sect. 1 of the Public Authorities Protection Act, 1893. In order to find out whether the defendants are within the protection afforded by the Act, you must ask what the obligation was which led to the doing of the act complained of. If the defendants were obliged to do the act by their statutory or public duty or authority, they are protected by the statute. In *Bradford Corporation v. Myers* (1) there was no obligation upon the corporation to get rid of the coke. If the defendants were acting in the direct execution of a public or statutory duty, it does not matter that a private contract intervenes: *Edwards v. Vestry of St. Mary, Islington* (2); *The Ydun* (3); *Fielding v. Morley Corporation* (4); *Jeremiah Ambler & Sons, Limited v. Bradford Corporation* (5); *Parker v. London County Council* (6); *Lyles v. Southend-on-Sea Corporation* (7); *Gawley v. Corporation of Belfast* (8); *Williams v. Mersey Docks and Harbour Board* (9); *Halsbury's Laws of*

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(1) [1916] 1 A. C. 242.

(2) 22 Q. B. D. 338.

(3) [1899] P. 236.

(4) [1899] 1 Ch. 1.

(5) [1902] 2 Ch. 585.

(6) [1904] 2 K. B. 501.

(7) [1905] 2 K. B. 1.

(8) [1908] 2 I. R. 34.

(9) [1905] 1 K. B. 804.

K. B. Div. England, xxiii, p. 342. I admit that *Sharpington v. Fulham* 1917. *Guardians* (1) is against me, but in that case the whole relationship between the plaintiff and the guardians was based upon a private duty arising out of a private contract between them.

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William Shannon and Denning K.C., for the plaintiff:—

We rely on the decision in *Bradford Corporation v. Myers* (2). In that case Lord Buckmaster said, at p. 247: "It may be conceded that the local authority were bound properly to dispose of their residual products; but there was no obligation upon them to dispose by sale, though this was the most obvious and ordinary way, still less was there any duty to dispose of them to the respondent. No member of the public could have complained if the respondent had not been supplied; nor had any member of the public the right to require the local authority to contract with him." At p. 253, Lord Atkinson said: "In my view this case turns upon the nature of the duty owed by the appellants to the respondent for the breach of which the latter sues. Was it a private duty created by the specific contract entered into between the parties for the sale and delivery with reasonable care of this load of coke, or was it a public duty within the meaning of sect. 1 of the Public Authorities Protection Act of 1893?" In this case we are suing for the breach of the private contract entered into with us or for the breach of the private duty owed to us, and not for a breach of any public duty. See also the judgment of Lord Shaw at the bottom of p. 263. We could not have compelled the county council to employ us, nor could we have complained if they had employed our next-door neighbour instead of us. In the tramway cases any person who had the necessary penny could have compelled the local authority to receive him on their tram. It is the relationship between the parties, and not the nature of the transaction, which must be looked at. What the defendants were doing was "merely incidental" to their statutory duty: *Clarke v. St. Helen's Borough Council* (3), Swinfen-Eady L.J., at p. 682. In the *Bradford Case* (4), Buckley L.J. said, at p. 424: "I know of no case in which the Public Authorities Protection Act has been held to apply where a voluntary contract has been entered into

(1) [1904] 2 Ch. 449.

(2) [1916] 1 A. C. 242.

(3) 113 L. T. R. 681.

(4) [1915] 1 K. B. 417.

under a statutory authority." As Farwell J. said in *Sharlington v. Fulham Guardians* (1), at p. 456, this "is a complaint by a private individual in respect of a private injury done to him."

Leonard in reply:—

The accident happened in the direct execution of an Act of Parliament, and therefore no question of public duty or authority can arise. The county council could only act through the intervention of contract; they could not do the work themselves. In *Bennett v. Borough of Stepney* (2) the claim was based on contract.

Cur. adv. vult.

SIR JAMES CAMPBELL C.J.:—

May 15.

The question for decision in this case comes before this Court upon a case stated by Ronan L.J. upon the hearing of a civil-bill appeal at the Assizes. The facts are shortly as follows:—The defendants, in pursuance of their statutory duties as road authority, and for the purpose of procuring the necessary road materials, erected a stone-crusher near a quarry at Ballaghmore. The stones were brought to the crusher in small waggons, which ran along a double line of railway, roughly laid down between the quarry and the crusher. The deceased Hayes and his mare were employed by the defendants for the haulage of those waggons; and in the course of the work, owing to the defective laying of the rails, the mare caught her foot in them, and was thrown down, being so badly injured that she had to be destroyed. Hayes subsequently died, and after his death and more than six months after the date of the accident, the present civil bill was brought by his administratrix, claiming damages for the loss of the mare, and a decree for £20 was given by the County Court Judge.

The sole and only point open before this Court is whether the defendants were entitled to the benefit of the Public Authorities Protection Act, 1893 (56 & 57 Vict. c. 61), sect. 1 (a), the proceedings not having been instituted until after the expiration of six months from the date of the neglect or default complained of. The section deals with "any action, prosecution, or other proceeding . . . against any person for any act done in pursuance, or execution, or intended execution of any Act of Parliament, or

(1) [1904] 2 Ch. 449.

(2) 107 L. T. R. 383.

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of any public duty or authority, or in respect of any alleged neglect or default in the execution of any such Act, duty, or authority"; and the contention upon behalf of the defendants was that their alleged neglect or default in the supply of suitable plant for the work, which the deceased under his contract with them was engaged to perform, was a neglect or default in the execution of their statutory duty to keep the county roads in repair. Prior to the recent decision of the House of Lords in *Bradford Corporation v. Myers* (1), the authorities were conflicting and not easy to reconcile; for while on the one hand it had been held in many cases, of which *Fielding v. Morley Corporation* (2); *The Ydun* (3); and *Edwards v. Vestry of St. Mary, Islington* (4), are familiar examples, that the Act applied to any neglect or default arising under any contract entered into for the direct object of the execution of a statutory or public duty, it was upon the other hand decided in many other cases, out of which for the present purpose it is only necessary to cite *Sharpington v. Fulham Guardians* (5), that the Act upon its true construction must be confined to acts or omissions occurring in the necessary execution of the statutory powers, or in the performance of the public duty, and causing damage or loss to the particular members of the public, in whose interest or for whose benefit the statutory powers are enforced, or the public duty discharged, and does not extend to private duties or obligations arising out of contracts with particular individuals, even though such contracts are entered into by the public authority for the purpose of enabling it to give effect to its powers or obligations. I interpret the judgments in the House of Lords in *Bradford Corporation v. Myers* (1) as expressly approving and affirming this latter construction as adopted by Farwell J. in *Sharpington v. Fulham Guardians* (5); and although such a construction cuts down by a subtle and drastic limitation the wider application which the literal language of the Act might seem to justify, I am satisfied that some such limitation is required as the only alternative to the wholesale application of the section in question to the innumerable contracts and obligations which a

(1) [1916] 1 A. C. 242.

(2) [1899] 1 Ch. 1.

(3) [1899] P. 236.

(4) 22 Q. B. D. 338.

(5) [1904] 2 Ch. 449.

public authority, such as a county council, must necessarily enter into for the due enforcement of its powers or the performance of its duties. I have no doubt that cases will still arise in which upon the facts it may be difficult to draw the line; but finding myself unable to distinguish in principle the facts in this case from those which were before Farwell J. in *Sharpington v. Fulham Guardians* (1), I am bound to follow his decision in that case in view of its adoption and approval by the House of Lords in *Bradford Corporation v. Myers* (2). The question submitted to us must be answered by declaring that the Public Authorities Protection Act did not constitute a valid defence in this case.

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MADDEN J. :—

I have come to the conclusion with regret that the questions submitted to us must be answered in favour of the plaintiff. I say with regret, for it seems to me that a county council performing the statutory duty of repairing a county road by direct labour in the only possible manner, that is to say by employing labourers under contracts of service, is acting directly in the execution of this duty, and that the case is within the mischief which the Legislature had in view when the Act was passed. During the argument, I entertained a hope that it would be possible to hold that a public body so acting is entitled to the protection afforded by the Public Authorities Protection Act. This hope was founded on observations made by Farwell J. in *Sharpington v. Fulham Guardians* (3), in which, referring to a judgment of Romer L.J. in *Jeremiah Ambler & Sons, Limited v. Bradford Corporation* (4), he suggests a distinction between an action "whose ground is an act done by the defendants directly in execution, or intended execution, of their public duty or authority," and one which he describes as "an action based upon a contract which was only incidental to their duty." The duty imposed on the guardians in the case before Farwell J. was to provide a receiving house for poor children. This duty, as he points out, might be carried out by building a house, or altering a house, and accordingly they were acting *intra vires* in entering into the contract with the

(1) [1904] 2 Ch. 449.
(2) [1916] 1 A. C. 242.

(3) [1904] 2 Ch., at p. 455.
(4) [1902] 2 Ch. 585, at p. 594.

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plaintiff in regard to which the act complained of was done, not directly in the performance of a public duty, but in carrying out a contract which was incidental to the performance of this duty. The word "directly" is not contained in the statute. It occurs in the following passage in the judgment of Lord Buckmaster in *Bradford Corporation v. Myers* (1):—"It is not because the act out of which an action arises is within their power that a public authority enjoy the benefit of the statute. It is because the act is one which is either an act in the direct execution of a statute, or in the discharge of a public duty, or the exercise of a public authority." It seems to me that the test to be applied, according to Farwell J. and Lord Buckmaster, is whether the contractual relation out of which a cause of action arises is directly or incidentally connected with the performance of a public duty. The decision of the House of Lords in *Bradford Corporation v. Myers* (2), is not inconsistent with this reading of the statute. The contract for the sale of coke in that case was only incidentally connected with the performance of the public duty of supplying gas to the inhabitants of a district, and I can find nothing in the judgments of the members of the House which has a direct bearing on the present case.

But I find in the report of the case in the Court of Appeal (3), that Buckley L.J. placed an interpretation on the Public Authorities Protection Act, which involves the application to the present case of a test different from that suggested by Farwell J.; he says (p. 423): "Before considering the authorities I desire to make this one general observation. I know of no case in which the Public Authorities Protection Act has been held to apply where a voluntary contract has been entered into under a statutory authority." After referring to cases "in which in a sense there might be said to be a contract to perform a statutory duty," as an illustration, he takes the case of a tramway company whose duty it is to admit as a passenger any person who presents himself and tenders his fare. Here "there is no volition on the part of the corporation to make a contract with the intending passenger; they are bound to make the contract with him if he chooses to make it with them. There have been cases of that kind under

(1) [1916] 1 A. C., at p. 247.

(2) [1916] 1 A. C. 242.

(3) [1915] 1 K. B. 417.

the Act of 1893, and I will refer to them presently, but there is no case in which the Act has been held to apply where it was at the option of the public authority, seeking the protection of the Act, either to make or refuse to make a particular contract." This clear and unambiguous language excludes the consideration in regard to any particular contract of the question whether it is incidentally or directly connected with the performance of the public duty.

It was not necessary for the decision of the particular case to lay down this general principle. But the decision of the Court of Appeal was affirmed by the House of Lords, and I am bound to apply to the present case the test as laid down by Buckley L.J. As it was in the option of the county council either to make or to refuse to make the particular contract out of which this action arises, there is nothing further to be considered in the case. I concur in deciding that we are bound by authority to hold that the Public Authorities Protection Act does not apply to the case before us. But as the case is a novel and interesting one, differing in many of its circumstances from decided cases, I have stated the precise grounds on which I have arrived at this conclusion.

GORDON J. :—

The only question to be decided by the Court in this case is whether the Public Authorities Protection Act constitutes on the facts a valid defence to the action. It is clear, and has been so decided in several cases, that the Act does not apply to every action that may be brought against a public authority. In *Sharpington v. Fulham Guardians* (1), Mr. Justice Farwell held that it did not apply to an action arising out of a contract made by a public authority with a builder to erect certain works required by them for the purpose of carrying out their public duty to supply a receiving house for poor children. He said (at p. 456): "A breach or negligent performance of that duty would be an injury to the children, or possibly to the public, who might be injured by finding the children upon the highway. In order to carry out this duty they have power to build a house or alter a house, and they accordingly entered into a private contract. . . . It [the action] is a complaint by a private individual in respect

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of a private injury done to him. The only way in which the public duty comes in at all is, as I have pointed out, that if it were not for the public duty any such contract would be ultra vires. But that would apply to every contract." This case was fully considered, and the decision and reasoning of the learned judge were approved of in the recent case in the House of Lords, to which I shall refer. Lord Justice Romer, in his judgment in *Jeremiah Ambler & Sons, Limited v. Bradford Corporation* (1), suggests that the Act only applies to an action "whose ground is an act done by the defendants [a public authority] directly in execution, or intended execution, of their public duty or authority." But the recent case in the House of Lords, *Bradford Corporation v. Myers* (2), makes the position reasonably clear. At p. 247 the Lord Chancellor says: "It is not because the act out of which an action arises is within their power that a public authority enjoy the benefit of the statute. It is because the act is one which is either an act in the direct execution of a statute, or in the discharge of a public duty, or the exercise of a public authority. I regard these latter words as meaning a duty owed to all the public alike or an authority exercised impartially with regard to all the public. It assumes that there are duties and authorities which are not public, and that in the exercise or discharge of such duties or authorities this protection does not apply." Lord Haldane, at p. 251, after referring to the restriction of the Statute upon ordinary rights, says: "I think that the words used must not have more read into them than they express or of necessity imply, and I do not think that they can be properly extended so as to embrace an act which is not done in direct pursuance of the provisions of the statute or in the direct execution of the duty or authority."

In the case before us the defendants in the actual repairing of the roads were acting in *direct* pursuance and execution of their statutory duty and authority, but were they doing so when they laid down the rails from the quarry to the stonebreaker, and when they, by contract with Hayes, brought him and his horse to work at the place where these rails were laid down? No doubt, in order to repair the roads, it was necessary that road-metal should be obtained; but this might be done in various

(1) [1902] 2 Ch. 585, at p. 594.

(2) [1916] 1 A. C. 242.

ways, and no particular method is prescribed by statute. The council might enter into a contract with some person to procure the metal, and lay it on the roads. They might contract with someone to bring the metal to the roads, and then apply it themselves by direct labour; or, as in the present case, they might get part of the work of supplying the material done by direct labour, and part of such work done by some person, like Hayes, with whom the council entered into an arrangement to do it. Hayes had no right, as a member of the public, to compel the council to make any such arrangement or contract with him, nor had he any right, as a member of the public, to bring his horse to the place where the animal was injured.

Applying the decisions I have referred to, and the principles enunciated in the judgments, to the facts of this case, how can it be said that the cause of action complained of arose in the *direct* execution by the defendants of any statute, or in the discharge of a public duty owed by them to all the public alike, or in the discharge of a public authority exercised by them impartially with regard to all the public? I think, on the contrary, it was a breach or neglect of duty owed to one man, Hayes, by which he, as an individual, suffered loss.

Mr. Leonard referred to the case of *Edwards v. Vestry of St. Mary, Islington* (1), which he said was the strongest authority in his favour. But when that case is examined I do not think it will be found to be in conflict with any of the cases I have referred to. The cause of action in that case arose in the course of the *direct* execution of an Act of Parliament, or discharge of their public duties, by a local authority; and the Lord Chancellor discussed and considered the case in his judgment in *Bradford Corporation v. Myers* (2), from which I have just quoted, and said that it did not touch the case with which he was then dealing.

For these reasons I am of opinion that the Public Authorities Protection Act does not constitute a defence to the plaintiff's action in this case.

Solicitor for the plaintiff: *A. C. Houlihan*.

Solicitor for the defendants: *Thomas Conway*.

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April 24.
May 4, 15.

Public Health Acts—“Owner”—*Notice*—*Service on Receiver in minor matter*—*Abatement of Nuisance*—*Voluntary payment*—“*Imposition*”—*Lease*—*Covenant*—*Public Health (Ireland) Act, 1878 (41 & 42 Vict. c. 52), sects. 2, 110, 111, 112, 120.*

The defendant held from the plaintiff (who was a minor ward of Court) certain premises under a lease which contained a covenant to pay the rent “clear above all taxes, charges, and impositions whatsoever.” A nuisance existed upon the premises comprised in the lease, and the sanitary authority served a statutory notice under the Public Health (Ireland) Act, 1878, upon D., the receiver over the minor’s estate as “owner,” calling for the abatement of the nuisance, and requiring certain works to be executed. The works were duly executed, and proceedings by civil bill were, with the leave of the Lord Chancellor, instituted in the name of the minor, as plaintiff, to recover the expense from the defendant.

Held, that D. was not the owner within sect. 2 of the Public Health (Ireland) Act, 1878; and that, therefore, there had been no service upon the owner of the notice prescribed by sect. 110 of the Act. *Corporation of Bacup v. Smith*, 44 Ch. D. 395, followed.

Held, also, by Campbell C.J. and Madden J., that the works were done voluntarily, and not under compulsion of the statute, and that the expense incurred was not an “imposition” within the terms of the defendant’s lease.

SPECIAL CASE, stated pursuant to the provisions of sect. 35 of the Civil Bill Courts Procedure Amendment Act (Ireland), 1864 (27 & 28 Vict. c. 99), for the opinion of the King’s Bench Division, by Ronan L.J., sitting as judge of assize at the Summer Assizes, 1916, for the King’s County.

The case set out as follows:—

“1. This case came before me at the Summer Assizes for the King’s County, July, 1916, on an appeal from a decree of the County Court Judge, dated 21st March, 1916, for the sum of

(1) Before SIR JAMES CAMPBELL C.J., MADDEN J., and GORDON J.

£31 5s. 7d., costs and expenses. Owing to the number of cases and statutes to be cited, it was argued before me in Dublin by the consent of the parties.

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"2. The civil bill was brought for £31 5s. 7d., money payable to the plaintiff under a covenant in the defendant's lease to pay the rent reserved 'clear above all taxes, charges, and impositions whatsoever.' For fuller details I refer to the civil bill.

"3. The defendant held from the plaintiff (who is a ward of Court) certain premises in Birr under a lease for lives or 31 years, dated the 13th July, 1857, containing a covenant to pay the rent 'clear above all taxes, charges, and impositions whatsoever.' I held on the construction of the lease that if the landlord was compelled by process of law to pay the sanitary authority or to expend moneys on the premises under the provisions of sects. 110-120 of the Public Health (Ireland) Act, 1878 (41 & 42 Vict. c. 52), the tenant would be bound to indemnify him.

The cases will be found collected at pp. 188, 190, of Foa's Landlord and Tenant (5th edition), and in the notes to the sections in the 2nd edition of Vauston's Public Health Acts. The real question in this case is whether the expenditure was incurred under compulsion within the meaning of the authorities.

"4. The process is rather complicated, and is as follows:—

No. 1. The sanitary authority serve the notice under sect. 110.

No. 2. If the person served makes default, the sanitary authority bring the case before justices, sect. 111.

No. 3. The Court may make an order requiring him to comply with the notice, or part thereof, or to abate the nuisance otherwise, sect. 112.

No. 4. If he fails to obey the order, the sanitary authority may do the work themselves and recover from him the expenses.

"5. If all these steps were taken with such a lease as I have held this to be, there would be no doubt that the landlord could have recovered from the tenant. See sect. 120.

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"6. In *Budd v. Marshall* (1) the majority of the Court of Appeal held that if the order was made under sect. 112, the landlord might do the work himself and recover, and that he need not wait for No. 4. above. In *Foulger v. Arding* (2), at p. 704, Collins M.R. held that the landlord might proceed to do the work on being served with the notice (No. 1), and that he need not wait for the order to comply with it (No. 3). This is the farthest that any case has gone as far as I know.

"7. The facts in the present case are as follows:—

"8. By order of the Lord Chancellor, dated the 7th of July, 1913, Patrick Deignan was appointed receiver in the minor matter over the plaintiff's freehold estates, including the premises in the said lease.

"9. The notice under the Public Health (Ireland) Act, 1878 (41 & 42 Vict. c. 52), set out in the schedule hereto was served personally on the said Patrick Deignan, who handed it to his solicitor, who in turn sent it to the solicitor having carriage in the minor matter. The notice was ultimately submitted to the Lord Chancellor for directions, and by order of the Lord Chancellor dated the 25th April, 1914, it was ordered that the receiver be at liberty to comply with the said notice, and take such proceedings against the defendant as he might be advised.

"10. In consequence of the receipt of the said notice and the said order of the 25th April, 1914, the works mentioned in the notice, which were works on the said premises, were carried out by the receiver on behalf of the owner at a total cost of £31 5s. 7d., which was admitted to be a reasonable sum.

"11. After considerable discussion, it was admitted, and I held, that if this notice, 1, was a notice complying with sect. 110 of the Public Health (Ireland) Act, 1878, as a notice to the plaintiff; and, 2, was duly served so as to entitle the sanitary authority to take proceedings and obtain an order against the plaintiff under sects. 111 and 112 of the Public Health (Ireland) Act, 1878, the plaintiff would be entitled to recover in the action on the ground that it was a payment under compulsion of the notice. Mr. Denning, for the defendant, contended that it was not

such a notice, and that it was not served on the plaintiff within the meaning of sect. 110, and that no order could have been obtained against him under sects. 111 and 112; and that the payment was not made under compulsion within the meaning of the authorities.

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"12. Mr. Price, on behalf of the plaintiff, contended:—

"(a) That Patrick Deignan was the owner within the meaning of the Act.

"(b) That service upon him was good service upon the owner.

"(c) That the notice having, in fact, been transmitted to and acted upon by the true owner in the manner stated, there was good service.

"(d) That the works having been executed in consequence of the receipt of the notice, and in compliance with it, service of the notice was not necessary to bring the expenses within the covenant, and that service might be waived on behalf of the true owner.

"I express no opinion on the questions involved.

"13. All documents referred to are to be taken as incorporated in the case, and the Court is to be at liberty to draw inferences of fact.

"14. The question for the Court is whether on the facts stated, particularly having regard to the said notice and the facts as to the service of the notice, the said sum of £31 5s. 7d. is recoverable in this case.

"15. If the Court are of opinion the money is recoverable, the decree of the County Court Judge is to be affirmed, with £ costs of appeal. If the Court are of opinion that the money is not recoverable, the decree is to be reversed, and the civil bill dismissed on the merits, with £ costs below and £ costs of appeal."

SCHEDULE.

Public Health (Ireland) Act, 1878 (41 & 42 Vict. c. 52).

Form A. Notice requiring Abatement of Nuisance.

To Mr. Patrick Deignan, Rosse Row, Birr, Owner.

Take notice that under the provisions of the Public Health (Ireland) Act, 1878, the Birr Urban District Council, acting as urban sanitary authority, being satisfied of the existence of a nuisance at Duke Square, Birr, in the

K. B. Div. premises in the occupation of Messrs. Smyth Bros., arising from the insanitary
 1917. condition of the said premises owing to the want of proper drainage and
 HACKETT sanitary accommodation, do hereby require you within twenty-eight days
 v. from the service of this notice to abate the same, and for that purpose to
 SMITH. [necessary works set out].

If you make default in complying with the requisitions of this notice, or if the said nuisance, although abated, is likely to recur, a summons will be issued requiring your attendance to answer a complaint which will be made to a Court of summary jurisdiction for enforcing the abatement of the nuisance, and prohibiting a recurrence thereof, and for recovering the costs and penalties that may be incurred thereby.

Dated this 26th day of July, 1913.

Signature of Officer of Sanitary Authority, HENRY BARLOW.

Personal service on July 28th at Rosse Row.

Signed,

JOHN O'DONOHUE, S.S.O.

Price, for the plaintiff:—

I submit—Even on the assumption that the notice in this case was not properly served upon the owner, once the notice was served upon the receiver he was under a *prima facie* liability to penal consequences which amounted to compulsion upon him: *Andrew v. St. Olave's Board of Works* (1); *Foulger v. Arding* (2). Under the English Acts, if the wrong person is served with the notice, he is liable to a penalty, and the provisions of the Irish Act are the same. By sect. 112 of the Public Health (Ireland) Act, 1878, the Court may make an order "on such person," namely, "the person on whom a notice to abate a nuisance has been served" (sect. 111), requiring him to comply with the requisitions of the notice, and may impose a penalty of £5 upon him. Under both the Irish and English codes the man who gets the notice may, in fact, be ultimately fined, and, therefore, in both cases there is compulsion. In *Harris v. Hickman* (3) the notice was not from the sanitary authority at all. The decision in *Butcher v. Ruth* (4) is bad law, and quite irreconcilable with the English cases. It was not a case upon a covenant to discharge impositions; it was a claim by a tenant for a set-off against rent.

(1) [1898] 1 Q. B. 775.

(2) [1902] 1 K. B. 700.

(3) [1904] 1 K. B. 13.

(4) 22 L. R. Ir. 380.

The notice was in fact properly served, because the receiver was the "owner" within the definition contained in sect. 2 of the Act. He was "the person for the time being receiving the rackrent . . . as agent or trustee for [an] other person." In the *Corporation of Bacup v. Smith* (1), the receiver was appointed in a litigation inter partes, and therefore that case is distinguishable.

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There was in fact service of the notice upon the minor. In the case of a person who has been made a ward of Court all powers of acting are taken from him, and if the notice is given to, or in fact reaches the hands of those who are acting for him, it is good service. As to what is service of a notice, see *Mason v. Bibby* (2); *Ex parte Portingell* (3).

William Shannon and Denning K.C., for the defendant:—

We submit that the person who did the work was a mere volunteer. This case is ruled by *Harris v. Hickman* (4); if the receiver here got anything, it was at most an "intimation," as in *Harris v. Hickman* (4), and not a "notice." The argument on behalf of the plaintiff comes to this—that in any case in which a person is served with a notice he ipso facto becomes liable, quite apart from his status. *Andrew v. St. Olave's Board of Works* (5) turned on sect. 4 of the Public Health (London) Act, 1891, which contains provisions not found in the Irish Act. In order to make these expenses an "imposition," liability therefor must have been imposed by the Public Health (Ireland) Act, 1878, and the provisions of that Act must have been complied with. The condition precedent to the coming into operation of sects. 111 and 112 of that Act is service of the notice upon the owner, and before these sections can be put into operation there must be a judicial decision that the person served with the notice is the owner. Under our Act there can be no compulsion upon anyone until there has been proper service of the notice. The Court is not bound by *Andrew v. St. Olave's Board of Works* (5), and should follow in preference the decision of this Court in *Butcher*

(1) 44 Ch. D. 395.

(2) 2 H. & C. 881.

(3) [1892] 1 Q. B. 15.

(4) [1904] 1 K. B. 13.

(5) [1898] 1 Q. B. 775.

K. B. Div. v. Ruth (1). [They also cited *Thompson & Norris Manufacturing Company, Limited v. Hawes* (2); *Haedicke v. Friern Burnet Urban District Council* (3); *Oliver v. Camberwell Borough Council* (4); *Rhymney Iron Company v. Gelligear District Council* (5).]

The receiver is not the "owner" within the definition in the Act: *Corporation of Bacup v. Smith* (6). A receiver appointed by the Court is receiver for the Court and not for the owner: *Boehm v. Goodall* (7); *In re Flowers & Co.* (8).

The notice never in fact reached the hands of the owner. If the sanitary authority were in a difficulty about the service of the notice, sect. 267 of the Public Health (Ireland) Act, 1878, provided a remedy of which they did not avail themselves.

Price, in reply:—

Andrew v. St. Olave's Board of Works (9) is good law, and governs the present case. *Thompson & Norris Manufacturing Company, Limited v. Hawes* (2) does not apply, as it was a case where a mere intimation or warning, and not a statutory notice, was served on the people who executed the repairs.

Cur. adv. vult.

May 15.

SIR JAMES CAMPBELL C.J.:—

This case comes before the Court in the form of a case stated by Lord Justice Ronan upon the hearing before him at the recent Assizes of an appeal from the decree of the county court judge.

The facts are not in dispute, and are, shortly, these:—A nuisance was alleged by the sanitary authority to exist upon certain premises, the property of the plaintiff, but in the occupation of the defendant, as tenant under a lease, by the terms of which he was liable for all "impositions" over and above the rent which he covenanted to pay. The owner was a ward of Court, under the control and jurisdiction of the Lord Chancellor,

(1) 22 L. R. Ir. 380.

(2) 59 J. P. 580.

(3) [1904] 2 K. B. 807.

(4) 68 J. P. 165; 90 L. T. R. 285.

(5) [1917] 1 K. B. 589.

(6) 44 Ch. D. 395.

(7) [1911] 1 Ch. 155.

(8) [1897] 1 Q. B. 14.

(9) [1898] 1 Q. B. 775.

and Mr. Deignan was the receiver over the minor's estate, being thereto duly appointed by the Lord Chancellor. The statutory notice under the Public Health (Ireland) Act, 1878, calling for the abatement of the alleged nuisance, and requiring certain structural alterations to be executed for the purpose on the leasehold premises, was addressed to and served upon Mr. Deignan as "owner." He handed this notice to the solicitor having carriage in the minor matter, who thereupon brought it to the notice of the Lord Chancellor, and an order was made directing the required works to be carried out, with liberty to take such proceedings to recover the expenses of the work from the lessee as counsel might advise. The works were duly executed, and the civil bill was then instituted in the name of the minor, as plaintiff, to recover the expense from the lessee, as being an "imposition" within the meaning of the covenant in the lease. The case stated contains a concise statement of the agreed facts, as also of the contentions raised on either side on the hearing of the appeal from the decree on this civil bill.

When this case came before this Court originally the Court was constituted of Mr. Justice Gordon and myself, and upon that occasion the two main propositions contended for by Mr. Price, as counsel for the plaintiff, were, first, that the receiver was the "owner" within the meaning of the definition in the Public Health (Ireland) Act, 1878, and that, therefore, the notice prescribed by sect. 110 of that Act was properly addressed to and served upon him, or, in the alternative, that the notice having reached the Lord Chancellor, who stood in loco parentis to the owner, it was in fact received by, though not addressed to, or served upon, the actual owner; and, second, that even if there was no proper service upon the owner, the receiver, once the notice was served upon him, incurred a possible risk of penal consequences in the event of his failure to comply with its terms, sufficient to alter compliance with it by the Court from a purely voluntary act to an act done under compulsion, and to make the expense incurred an "imposition" within the terms of the covenant in the lease. In support of his latter contention Mr. Price quoted several English decisions; but, after the case stood over for judgment, I found that there was not only a

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K. B. Div. decision by the King's Bench Division in Ireland, apparently
 1917. adverse to Mr. Price's second contention, but also a number of
 HACKETT English decisions in the same direction, to which our attention
 v. SMITH. had not been called. I accordingly requested the counsel on both
 Sir James sides to attend in Court, and, having mentioned these decisions to
 Campbell C.J. them, stated that the case must be reargued, and, on a subsequent
 occasion, a fuller discussion of the case took place before us, the
 Court being reinforced by the presence of Mr. Justice Madden.

I shall deal in the first place with the questions that arise upon the notice, as it is manifest that if Mr. Price is right in his contention upon this branch of the case it disposes of the whole matter, and the argument based upon the alleged compulsion of the receiver becomes superfluous.

Now I wish to state explicitly that if the question before us merely affected the estate of the minor, I should be prepared to hold that the order of the Lord Chancellor would be amply sufficient to justify this outlay at the expense of the minor; because any owner, who is himself the person liable and compellable to abate the alleged nuisance, is clearly at liberty to waive all the formalities of the Act, and proceed at once with the execution of the requisite work, provided he is content to do so at his own expense, or if the circumstance of the owner being a minor and a ward of Court, placed the sanitary authority in any real difficulty in their attempt to abate the alleged nuisance, I should have striven to give a very liberal interpretation to the provisions as to "notice" in the Public Health (Ireland) Act, 1878; but I consider that I am not at liberty to do so, in view of the simple procedure to be found in the Act itself to obviate any difficulty of the kind, or in a case like the present in which it is sought as a result of the proceedings taken by the sanitary authority, to treat the action taken under the order of the Lord Chancellor as creating an "imposition," and thereby to shift the burden of the obligation upon a third party. In every such case, in my opinion, strict proof must be given of compliance with the provisions of the Public Health (Ireland) Act, 1878, as otherwise the action of the Lord Chancellor would be purely voluntary, and as such could not create an "imposition" within the terms of the lease. We were referred in this connexion

to the case of *Corporation of Bacup v. Smith* (1), in which that eminent judge, Mr. Justice Chitty, held that the word "owner" in sect. 4 of the Public Health Act (England), 1875 (2), which contains a definition of "owner" identical with that to be found in the Irish Act of 1878, did not include a receiver appointed by the Court, and he forcibly points out that under the Nuisances Removal Act (England), 1855 (3), which is repealed by the Public Health Act, 1875, the definition of "owner" expressly includes a "receiver or sequestrator appointed by the Court," thereby at least suggesting the inference that the Legislature in omitting these words from the definition in the Act of 1875 did so designedly. Mr. Price sought to get rid of the effect of this decision by the suggestion that Chitty J.'s observations were confined to receivers appointed in a litigation *inter partes*, and that in some unexplained way a receiver in a minor matter in the Court of Chancery stood in a different position. It is enough to say in reply that no such limitation is to be found in the judgment, and that the receiver in both cases alike is the officer and agent of the Court and not of the party. He further contended that, even on the assumption that the receiver was not the "owner" within the definition, the fact that the notice served upon and addressed to him as such was brought to the knowledge of the Lord Chancellor and acted upon by him, was sufficient to take the facts of this case outside the decision in *Corporation of Bacup v. Smith* (1). In my opinion, a careful analysis of the relevant sections of the Public Health (Ireland) Act, 1878, disposes of this argument.

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The first material section is 110. "On the receipt of any information respecting the existence of a nuisance the sanitary authority shall, if satisfied of the existence of a nuisance, serve a notice upon the person by whose act, default, or sufferance the nuisance arises or continues, or, if such person cannot be found, on the owner or occupier of the premises on which the nuisance arises, requiring him to abate the same within a time to be specified in the notice, and to execute such works and do such things as may be necessary for that purpose: Provided—First. That where

(1) 44 Ch. D. 395.

(2) 38 & 39 Vict. c. 55.

(3) 18 & 19 Vict. c. 121, s. 2.

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the nuisance arises from the want or defective construction of any structural convenience, or where there is no occupier of the premises, notice under this section shall be served on the owner." It is absolutely plain from the terms of the notice served in this case that the alleged nuisance arose from the defective construction of certain structural conveniences within the meaning of the proviso, so that to constitute a valid notice under the section it must have been served on the owner. By sect. 2 of the Act "owner" is thus defined: "'Owner' means the person for the time being receiving the rack-rent of the lands or premises in connexion with which the word is used, whether on his own account or as agent or trustee for any other person, or who would so receive the same if such lands or premises were let at a rack-rent." It will be noted that the word "means" is used and not "includes," the former being an "excluding" and the latter an "extending" definition. Section 111 is as follows:—"If the person on whom a notice to abate a nuisance has been served makes default in complying with any of the requisitions thereof within the time specified, or if the nuisance, although abated since the service of the notice, is, in the opinion of the sanitary authority, likely to recur on the same premises, the sanitary authority shall cause a complaint relating to such nuisance to be made before a justice, and such justice shall thereupon issue a summons requiring the person on whom the notice was served to appear before a court of summary jurisdiction." Then follow supplementary provisions conferring certain powers on the Court in dealing with such person when the complaint comes before it. I take it to be clear that the foundation and condition precedent for this penal jurisdiction is and must be the service of a valid notice under sect. 110. Section 267, which deals with the service of notices, orders, &c., is important in connexion with the argument addressed to us on behalf of the plaintiff upon the first question in the case. It reads as follows:—"Notices, orders, and any other documents required or authorised to be served under this Act may be served by delivering the same to or at the residence of the person to whom they are respectively addressed, or where addressed to the owner or occupier of premises, by delivering the same or a true copy thereof to some person on the premises, or if there is no person on the

premises who can be so served, by fixing the same on some conspicuous part of the premises; they may also be served by post by prepaid letter, and if served by post shall be deemed to have been served at the time when the letter containing the same would be delivered in the ordinary course of post, and in proving such service it shall be sufficient to prove that the notice, order, or other document was properly addressed and put into the post." Then follow these important words: "Any notice by this Act required to be given to the owner or occupier of any premises may be addressed by the description of the 'owner' or 'occupier' of the premises (naming them) in respect of which the notice is given, without further name or description."

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It is only necessary to read the elastic provisions of this section in order to dispose of all arguments addressed to us in this case based upon any alleged inconvenience or difficulty in serving the "owner" when he happens to be a minor and a ward of Court, because it enables the sanitary authority to address the notice in such a case to the "owner," without further name or description, while in the present instance good service of such a notice could have been effected by delivering it, or a true copy, to some person on the premises, or by sending it through the post in the ordinary way. It was the neglect of the sanitary authority to adopt this most simple procedure which has caused all the trouble in the case now before us. I hold in the first place, on the authority of *Corporation of Bacup v. Smith* (1), that the receiver in this case was not the "owner" within the definition, and secondly, that the notice served upon him never in fact reached the hands of the owner in any sense that exposed him to liability or amounted to compulsion.

I shall now address myself to the second contention raised before us on behalf of the plaintiff, namely that on the assumption that service of the notice upon the receiver was not service upon the owner, within the definition of that term in the Act, still that the service in fact upon him was sufficient to render the subsequent compliance with its terms by the Court an act done under compulsion of the statute within the authorities, and therefore sufficient to constitute the expenditure an "imposition"

(1) 44 Ch. D. 395.

K. B. Div. within the meaning of the covenant in the lease. There are
 1917. many decisions in English cases under sections in Public Health
HACKETT Acts analogous to those contained in the Irish Act which are
v. difficult to reconcile with one another in certain respects, but after
SMITH. a close examination of them I have come to the conclusion that
 Sir James they may be treated as establishing, for the time at least, two
 Campbell C.J. propositions—first, that when the sanitary authority serve the
 statutory notice upon the “owner” or “occupier” of premises,
 upon which a nuisance is alleged to exist, and he is ordered by
 the notice to abate the nuisance, he is entitled to treat it as a
 request by the sanitary authority to execute the necessary works,
 and to execute them accordingly, and should it eventually turn
 out that he was not compellable under the statute to do so, but
 that the obligation was imposed by it upon the sanitary authority
 itself, he can recover from it the expenses incurred as money paid
 at its request; and second, that where the claim, based upon the
 service of such a notice, is made by the person served to recover
 the expenses of his compliance, not from the sanitary authority
 itself who served the notice, but from a third party, under any
 contract express or implied, the claimant can only succeed upon
 proof that the provisions of the Act have been strictly complied
 with, as otherwise his act will be that of a mere volunteer.

I now proceed to review the more important of these decisions, and the position will be more clearly understood if they are taken in chronological order. In *Gebhardt v. Saunders* (1), a case under the Public Health (London) Act, 1891 (2), the facts were that a nuisance existed in the cellar of the premises owing to a stoppage of the drains. The premises were in the occupation of a tenant, and the sanitary authority, being unable to determine whether the nuisance was the result of a structural defect in the drains or of improper use by the tenant, served upon the premises a notice addressed to the owner or occupier under sect. 4, sub-s. 1, of the Act, which is practically identical with sect. 110 of the Irish Act, but contains a further sub-s. 4, which is not to be found in the Irish Act, and reads as follows:—“Where a notice has been served on a person under this section, and . . . such person makes default in complying with any of the requisitions of the notice

(1) [1892] 2 Q. B. 452.

(2) 54 & 55 Vict. c. 76.

within the time specified, he shall be liable to a fine not exceeding ten pounds for each offence, whether any such nuisance order as in this Act mentioned is or is not made upon him." The plaintiff gave notice of the defective state of the drains to the owner, who did nothing to remedy the nuisance; and having then himself complied with the terms of the notice at an expense of £18, brought his action against the owner to recover the amount. The jury found that the nuisance was caused by a want or defect of a structural character; but the judge non-suited the plaintiff on the ground that the notice required under sect. 4 of the Act should, under sub-s. 3, have been served upon the owner. Upon appeal by the plaintiff, it was held by Day J. that he was entitled to recover upon the ground that, having regard to the penalty imposed by sub-s. 4 of sect. 4 upon a person served with the prescribed notice under that section, upon failure to comply with its terms, coupled with the provisions of sect. 11 of the Act, which corresponds to sect. 120 of the Irish Act, the expenses incurred were money paid at the request of the defendant, who as owner was primarily liable; while Charles J. was of the same opinion, but adds this further ground:—"In my opinion, the ordinary principle of law is applicable to this case apart from the statute, the principle applicable to cases where one man has been legally compelled to expend money on what another man ought to have done" (1). This dictum is incomprehensible to me, as I am at a loss to understand where, apart from the statute, the legal compulsion upon the plaintiff came from; and this view of Charles J. has received no countenance in any other case of which I am aware. The section of the London Act which was under consideration in that case differed from the Irish section in the one essential particular, namely, that while in the former failure to comply with the notice exposes the person served to a prima facie liability to a penalty, whether a nuisance order is or is not subsequently made against him, no penalty is imposed by the Irish Act unless and until the person served has had a nuisance order made against him by a Court of summary jurisdiction, or in other words until it has been judicially decided that he is the party who under the statute is liable for the nuisance. In *Self v. Hove Commissioners* (2)

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(1) [1892] 2 Q. B., at p. 458. (2) 64 L. J. Q. B. 217; [1895] 1 Q. B. 685.

K. B. Div. the plaintiff had been served by the defendants, the sanitary
1917. authority, with the statutory notice under sect. 4 of the English
HACKETT Public Health Act, 1875, requiring him to abate a nuisance upon
v. premises of which he was the owner. This section, like sect. 4 of
SMITH. the London Act, renders the person served liable to a penalty for
 Sir James failure to comply with its terms. The plaintiff having carried out
 Campbell C.J. the required works, sought to recover the expenses from the
 sanitary authority as money paid at their request. The Court,
 Wills J. and Wright J., held that the action failed, because the
 plaintiff was by the Act the person who was himself compelled to
 do the work; and, second, because even if the sanitary authority
 itself and not the plaintiff had been the person legally liable to
 carry out the work, the service of the notice upon the plaintiff by
 the sanitary authority was not a request at all, but was a notice
 that the sanitary authority required the work to be done as a
 matter of right.

The next case in order of date is one of paramount importance, being a decision of the Court of Appeal in England by three most eminent judges—Lindley L.J., Lopes L.J., and Rigby L.J.—and having a direct bearing upon the contention which Mr. Price has argued before us in support of his second proposition. I refer to the case of *Thompson and Norris Manufacturing Co., Ltd. v. Hawes* (1). Under the Public Health (London) Act, 1891 (54 & 55 Vict. c. 76), to which I have already referred, before the service of the notice under sect. 4, corresponding to the notice under sect. 110 of the Irish Act, sect. 3 provides as follows:—"Information of a nuisance liable to be dealt with summarily under this Act in the district of a sanitary authority may be given to that authority by any person, and it shall be the duty of . . . the sanitary authority to give such directions to their officers as will secure the existence of the nuisance being immediately brought to the notice of any person who may be required to abate it, and the officer shall do so by serving a written intimation." In *Thompson v. Hawes* (1) a notice under this section, to which there is no corresponding section in the Irish Act, was served on the premises, addressed to the owner, and the occupier thereupon, without forwarding the

document to the owners, or informing them of it, caused the works to be executed, and then sought to recover the amount expended from the owners. It was held that the occupier, not being compellable to execute the work, had acted as a mere volunteer in doing so, and had no claim to be reimbursed by the owners. Lindley L.J. puts it in these words: "If certain machinery had been put in motion, then, perhaps, the plaintiffs might have been legally compellable to execute these repairs; and, if they had been so compellable, they would have had a cause of action against the defendants. But the necessary machinery never was put in motion."

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A curious feature in connexion with this important case is that I have failed to find the slightest reference to it, either in the arguments or judgments, in any one of the next three cases which, in order of date, were decided in England, although all three arose upon the construction of the same Public Health (London) Act, 1891, which was under consideration in *Thompson v. Hawes* (1). The first of these is the case of *Andrew v. St. Olave's Board of Works* (2), in which the plaintiff had been served by the sanitary authority with a notice under sect. 4 of the same London Act, requiring him to abate an alleged nuisance on the premises of which he was the owner, and under the mistaken belief that he was legally compellable to comply with the notice, he executed the required works. It afterwards turned out that the obligation was, under the Act, imposed upon the sanitary authority itself; and the owner thereupon brought an action against it to recover the expenses incurred by him. Lord Russell, in delivering the judgment of the Court, prefaced his remarks by these words:—"This is a case of considerable complication and difficulty, and I cannot say that in delivering the judgment which I do now I am free from doubt." He then proceeds to hold, upon the authority of Day J.'s judgment in *Gebhardt v. Saunders* (3), that, although it would be an answer to the claim for the penalty by the person upon whom the notice was served to show that some other person was responsible for the nuisance, still he regarded sect. 4, sub-s. 4, as putting upon the person

(1) 59 J. P. 580. (2) [1898] 1 Q. B. 775. (3) [1892] 2 Q. B. 452.

K. B. Div. served, not for all time, but *prima facie*, and for the time being, the liability to do what is necessary should be promptly done, leaving the question of his ultimate liability to be dealt with subsequently; and he then adds (at p. 781) these words:—"If that is the right construction to put on the section, the plaintiff in this case was compelled to do work which admittedly the defendants were legally compellable to do." I confess that I share in the doubt of Lord Russell as to the soundness of this decision, or of the view that a person can be said to be "compelled" to do an act when he is in a position to successfully resist the doing of it, by proof that some other person was responsible for the nuisance.

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In *North v. Walthamstow Urban Council* (1) the facts were that the sanitary inspector for the district of which the defendants were the sanitary authority served a notice in his own name upon the plaintiff, Millhouse, who was agent of the plaintiff, North, complaining of an alleged nuisance upon premises of which North was owner, and requiring certain works to be executed for the purpose of abating the nuisance. Millhouse, believing that he was bound by the notice to execute the work, did so, but upon ascertaining that the sanitary authority was itself the party liable under the Public Health Act to do the work and pay for it, he and the owner, North, brought an action against the sanitary authority to recover the cost as money paid at the request of the defendants. There is no section in the Public Health Act, 1875, similar to sect. 3 in the Public Health (London) Act, 1891, nor any provision requiring or directing the service of this preliminary notice by the sanitary inspector, so that the evidence of compulsion or request on the part of the local authority was even weaker than in the case of *Thompson v. Hawes* (2); Channell J., however, held that the case was identical in principle with *Andrew v. St. Olave's Board of Works* (3), and although that case was in apparent conflict with *Self v. Hove Commissioners* (4), he was prepared to follow and adopt it. It will be noted that in *North v. Walthamstow Urban Council* (1) the machinery of the Public Health Act was never put in motion at all, and the plaintiffs appear to have been

(1) 67 L. J. Q. B. 972. (2) 59 J. P. 580. (3) [1898] 1 Q. B. 775.

(4) 64 L. J. Q. B. 217; [1895] 1 Q. B. 685.

pure volunteers, and if the service of a formal notice, in compliance with an Act of Parliament, could not, according to the decision of the Court of Appeal in *Thompson v. Hawes* (1), deprive the person served of his character as a volunteer, it is impossible to see how a notice served, not under any statutory direction, nor by the sanitary authority itself, but on the mere motion of an inspector, could in any sense constitute compulsion so as to entitle the party served, after doing the necessary work, to recover the cost from the sanitary authority. It may well be that the decision in this case and the preceding case of *Andrew v. St. Olave's Board of Works* (2) would have been in accordance with the principle of the decision in *Thompson v. Hawes* (1) had that case been brought to the notice of the Court, but, as I have already pointed out, no reference can be found to it either in the arguments or the judgment in either case.

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The third of these cases is *Harris v. Hickman* (3), in which the defendant had held the premises from the plaintiffs for a term of three years, the defendant agreeing to pay "all present and future rates, taxes, assessments, and outgoings whatsoever in respect of the premises." After the expiration of the three years the defendant continued in occupation without any fresh agreement, and paid rent for the premises at the old rate. Subsequently, and while the defendant was still in possession, the sanitary authority served the plaintiffs as owners with the prescribed notice under sect. 3, and they therefore gave notice to the defendant, and required him to do the work necessary to abate the nuisance. He refused to do so, and the plaintiffs thereupon did the work themselves without waiting for the further notice under sect. 4, and sued the defendant for the amount. Wright J. held that the action could not be maintained on two grounds, the first of which alone is relevant to the question before us—namely, that the plaintiffs did the work voluntarily, and not under any obligation, and that the expenditure was consequently not an "outgoing" within the meaning of the covenant. He puts it in these words:—"It appears that the only notice with respect to this nuisance that was issued to the plaintiffs was a mere

(1) 59 J. P. 580. (2) [1893] 1 Q. B. 775. (3) [1904] 1 K. B. 13.
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K. B. Div. intimation of the existence of a nuisance under sect. 3 of the Act
 1917. of 1891 . . . This distinguishes the present case from *Andrew v.*
HACKETT *St. Olave's Board of Works* (1). There a notice was served under
v. sect. 4, and non-compliance with the requirements of that notice
SMITH. prima facie rendered the plaintiff liable to a penalty. He was
 Sir James consequently practically compelled to do the work. Here there
 Campbell C.J. was no compulsion at all.

The attention of Wright J. in this case was not called to *Thompson v. Hawes* (2), nor in his reference to *Andrew v. St. Olave's Board of Works* (1) does he refer to the important fact that in that case the defendant was the party liable under the statute to abate the nuisance. In the subsequent case of *Oliver v. Camberwell Borough Council* (3) the facts were identical with those in *Harris v. Hickman* (4); but upon this occasion *Thompson v. Hawes* (2) was quoted and relied upon, the notice served being the notice prescribed by sect. 3 of the Public Health (London) Act, 1891; and the Court, Wills J. and Kennedy J., held that they were bound by the decision in *Thompson v. Hawes* (2) to hold that the plaintiff was a mere volunteer; and while they preferred the reasoning of Channell J. in *North v. Walthamstow Urban Council* (5) to that of the Court of Appeal in *Thompson v. Hawes* (2) and of Wright J. in *Harris v. Hickman* (4), they held it was their duty to loyally follow the decision of the Court of Appeal.

A few weeks later, in *Haedicke v. Friern Barnet Urban District Council* (6), Mr. Justice Channell, with a natural regard for his own previous decision in *North v. Walthamstow Urban District Council* (5), in which he followed *Andrew v. St. Olave's Board of Works* (1), took the view that the decision in that case did not conflict with *Thompson v. Hawes* (2) and *Harris v. Hickman* (4), and that the three cases could be reconciled on the distinction that in the latter two cases the issue was between the owner as landlord and his tenant upon the express or implied contract resulting from the relation between them; while in *Andrew v. St. Olave's Board of Works* (1) the action was in respect of money alleged to have been paid by the plaintiff by reason of the pressure put upon him

(1) [1898] 1 Q. B. 775.

(2) 59 J. P. 580.

(3) 68 J. P. 165.

(4) [1904] 1 K. B. 13.

(5) 67 L. J. Q. B. 972.

(6) [1904] 2 K. B. 807.

by the person whom he was suing. On page 815 of the report he thus explains the distinction:—" *Thompson v. Hawes* (1) was a case in which a tenant was suing his landlord for money paid under alleged compulsion of a local authority." It seems to me that there the tenant would have to prove real compulsion. In *Harris v. Hickman* (2) the action was by the landlord against the tenant, and raised a similar question. It is quite different where one person sues another in respect of money alleged to have been paid by him by reason of pressure put on him by the person whom he is suing. When suing a third party, such as his landlord, the plaintiff has to prove that he was actually compelled—that the proceedings against him were such as he could not have effectually resisted." It will be observed that this necessity for proof of strict or real compulsion under the statute, which Channell J. considers to have been the true ground of the decision in *Thompson v. Hawes* (1) arose in a case where the plaintiff was seeking to recover the expenses from the person actually liable under the Act for the abatement of the nuisance, so that the necessity for proof of real compulsion would seem to be *à fortiori* in a case like the present, in which the claim is made against the defendant, not by reason of any liability of his under the Act, but by reason of an independent covenant in his lease, wholly apart from the statute. In *Rhymney Iron Company v. Gelligaer District Council* (3), the sanitary authority finding the drain connecting a house with the sewer to be so clogged that the sewage could not pass through, served a notice upon the owner of the house, under sect. 94 of the Public Health Act, 1875, requiring him to abate the nuisance. Upon his failure to comply, the sanitary authority proceeded against him by summons for non-compliance, and the magistrate, having found as a fact that the person by whose act, &c., the nuisance arose could not, in the words of the section, "be found," made the usual order against the owner. The Court affirmed his order, and though the facts as well as the particular section under consideration were different from those in *Gebhardt v. Saunders* (4) and *Andrew v. St. Olave's Board of Works* (5), Lord Reading C.J.

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(1) 59 J. P. 580.

(2) [1904] 1 K. B. 13.

(3) [1917] 1 K. B. 589.

(4) [1892] 2 Q. B. 452.

(5) [1898] 1 Q. B. 775.

K. B. Dir. in his judgment refers with approval to the principle of the decision in these cases. Finally in this connexion I should refer to the only relevant Irish decision that I have been able to find, the case of *Butcher v. Ruth* (1). The alleged nuisance in that case arose from the want of certain structural conveniences, and a notice under sect. 110 of the Irish Public Health Act, addressed to the "owner or occupier," was served upon the occupier only, and he without any communication with the owner complied with the notice and carried out the necessary works. Afterwards when sued by the owner for the rent of the premises, he claimed credit by set-off and counter-claim for the amount of the expenses so incurred by him. The plaintiff demurred upon the ground that the defence did not aver that the sanitary authority had served the plaintiff as owner with the notice prescribed under sect. 110, and the demurrer was upheld by the Court.

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It is not easy to reconcile these decisions, or to determine what principle emerges from the obscurity. Possibly, as I have already suggested, they may be read as deciding that when the sanitary authority, being itself the party liable under the Act to abate the nuisance, serves a person such as the owner or occupier of the premises with a notice under the Act requiring him to abate the nuisance, the person so served, if he complies with its terms, and abates the nuisance, can recover the expenses from the sanitary authority as money paid at their request, such request being presumed as the result of the duress or prima facie compulsion of the notice served by themselves. It is difficult to extend this principle to a case, for example, in which, the owner of the premises being the person liable under the Act to abate the nuisance, the sanitary authority, under a mistake as to the law or facts, serves the notice upon the occupier only, who thereupon complies with it, and afterwards sues the owner for the expenses incurred as money paid at his request. In such a case the person sued has been in no sense responsible for any duress or compulsion imposed upon the occupier, nor has he taken any step which would involve a request by him to the occupier to incur the expense, and I find the greatest difficulty in attributing any

element of duress or compulsion to the service of the notice on the occupier so long as he has a complete defence to any legal proceedings founded upon the notice. It was upon facts of this nature that this Court, in *Butcher v. Ruth* (1), held that the occupier was a volunteer, and therefore not entitled to recover from the owner. The decision in that case seems to accord with the principle of the decision of the English Court of Appeal in *Thompson v. Hawes* (2) and with the observations of Channell J. in *Haedicke v. Friern Barnet Urban District Council* (3). It is true that in *Thompson v. Hawes* (2) the notice served by the sanitary authority was not the notice analogous to that prescribed by sect. 110 of the Irish Act, but was the preliminary notice or intimation prescribed by sect. 3 of the Public Health (London) Act, 1891, which precedes the more formal notice prescribed by sect. 4 of the same Act, and has nothing to correspond with it in the Irish Act. Lindley L.J., in his judgment in *Thompson v. Hawes* (2), states that perhaps the result might have been different if they had in the case before them to deal with the service of the notice under sect. 4, and Wright J., in *Harris v. Hickman* (4), uses words to the same effect, but it by no means follows that any such result would arise in a case where the effect of a similar notice under sect. 110 of the Irish Act had to be considered. According to the view of Lord Russell C.J. in *Andrew v. St. Olave's Board of Works* (5), the element of prima facie compulsion, to be found in the service of the notice under sect. 4 of the London Act, arises from the fact that by that Act failure to comply with the terms of sect. 4 exposes the person served to an immediate and prima facie liability to a penalty. In the Irish Act the notice analogous to that under sect. 4 of the London Act resembles the preliminary notice under sect. 3, as it is the first step in the application of the machinery of the Act, and failure to comply with its terms does not, as I have already pointed out, subject the person served to any liability for a penalty prima facie or otherwise, and the person served under the Irish Act with the prescribed notice under sect. 110 never comes under any liability for a penalty

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(1) 22 L. R. Ir. 380.

(2) 59 J. P. 580.

(3) [1904] 2 K. B. 807.

(4) [1904] 1 K. B. 13.

(5) [1898] 1 Q. B. 775.

K. B. Div. unless and until the Court of summary jurisdiction at a later stage
 1917. has judicially decided that he is the person who, under the Act, is
HACKETT compellable to abate the nuisance.

v.
SMITH. In effect, therefore, this sect. 110 resembles sect. 3 of the
 London Act more closely than sect. 4; and in this way the
 Sir James Campbell C.J. decision of this Court in *Butcher v. Ruth* (1) would be in harmony
 with those of *Thompson v. Hawes* (2) and *Harris v. Hickman* (3).
 This question as to the effect of the decision in *Thompson v.*
Hawes (2) upon the construction of the Irish Public Health Act
 is a difficult and doubtful one, which may yet have to be con-
 sidered in some case in which the facts appropriately raise it;
 but, in my opinion, it does not arise upon the facts of the case
 now before us for the following reasons:—In all the cases under
 the Public Health Acts that have been cited, or that I have been
 able to find, in which this doctrine of implied duress or prima
 facie compulsion has been applied for the purpose of fixing the
 defendant with liability, the plaintiff suing to recover the expenses
 was invariably the person served by the sanitary authority with
 the notice under the Act, while the defendant was in each case
 the party; either the sanitary authority or another person, upon
 whom the obligation to abate the nuisance was directly imposed
 by the statute. The facts in the present case are fundamentally
 different, as the plaintiff, ex hypothesi, was not the person served
 with the notice, while the defendant, if liable at all, could only be
 liable under his covenant with the landlord, which is wholly out-
 side of and independent of the Act itself. The defendant was
 not legally compellable under the Public Health (Ireland) Act,
 1878, to execute the required work, and his sole and only liability
 is to reimburse his landlord for any outlay which is by law an
 “imposition” on the premises, while the plaintiff, on the other
 hand, was never subject to the compulsion of any notice served
 upon him. In *Corporation of Bacup v. Smith* (4), the receiver,
 who in that case as in this had been served with the notice,
 simply ignored it, and if he was entitled so to do, as Chitty J.
 held he was, I cannot see how the fact that the receiver in the
 present case passed on the notice to a third person who in turn

(1) 22 L. R. Ir. 380.

(2) 59 J. P. 580.

(3) [1904] 1 K. B. 13.

(4) 44 Ch. D. 395.

brought it before the Lord Chancellor, can possibly constitute the expenses incurred an "imposition" within the meaning of the covenant. They could not, in my opinion, constitute an "imposition," unless and until the plaintiff as landlord or his agent had been compelled to execute them, under the prescribed machinery of the Act. For these reasons, I am of opinion that Mr. Price's second contention has no application to the facts of this case, and holding also as I do that there was no service on the "owner" of the notice prescribed by sect. 110 of the Irish Public Health Act, I think the question submitted to this Court by Ronan L.J. must be answered in favour of the defendant; and consequently the decree of the County Court Judge should be reversed, and the civil bill dismissed on the merits. The defendant is entitled to the costs of the hearing before this Court.

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MADDEN J. concurred.

GORDON J. :—

In this case the owner was primarily liable to carry out the structural alterations which the sanitary authority required to be made in the premises. He made these alterations at his own expense, and now seeks to recover these expenses from the lessee of the premises on foot of a covenant contained in his lease by which the tenant covenanted to pay the rent reserved "clear above all taxes, charges, and impositions whatsoever." He can only recover if the cost of these alterations was an "imposition" within the meaning of the covenant. It is agreed that if this cost was incurred under compulsion of the sanitary authority the plaintiff would be entitled to recover, but if there was no such compulsion he would not be entitled to recover. I do not desire to express a decided opinion as to whether if a valid notice under sect. 110 of the Public Health (Ireland) Act, 1878, had been properly served on the owner by the sanitary authority, this would have amounted to such compulsion as would entitle him to recover from his lessee on the covenant in this lease, but I think it would. However in the view I take I do not consider it is necessary to go into that question.

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The owner was a minor, a ward of Court, and he and his property were under the care and jurisdiction of the Lord Chancellor. The Lord Chancellor had appointed a Mr. Deignan receiver over the minor's property, including the premises demised by the lease under which the defendant holds. The notice by the sanitary authority was directed to "Patrick Deignan, owner," and was served on him personally, and handed by him to the solicitor having carriage in the minor matter, who submitted it to the Lord Chancellor for directions; and the Lord Chancellor ordered that the receiver should be at liberty to comply with the notice and take such proceedings against the defendant as he might be advised. Now was this a good notice, and was it properly served? It is not directed to an "owner" simply, but it is directed to a particular person describing him as "owner" which in fact, or within the definition of "owner" given in the Public Health (Ireland) Act, 1878, he was not; nor was he an "agent" or "trustee" within the meaning of that definition. He was merely a receiver appointed by the order of the Court and responsible to the Court: see *Corporation of Bacup v. Smith* (1). It is argued that when he was served he might have done the work himself and sued the defendant for the amount. In my opinion this argument is not well founded. Whatever claim (if any) he might have sustained against the owner, or the sanitary authority, if it turned out that they themselves were liable, I do not see how he could have sustained any claim against the defendant on a covenant which he had entered into with the owner. But it is sufficient to say that he did not do the work himself, and he is not the plaintiff in this action. It is further argued that bringing the notice before the Lord Chancellor and his directions in reference to it cured any defect in the notice and amounted to proper service of it on the minor. The Lord Chancellor when he became aware that the sanitary authority were satisfied that certain things should be done to put the premises into sanitary condition, naturally gave liberty to the receiver to have these things done, without as I take it in any way determining whether the notice was good or bad, or whether it had or had not been properly

(1) 44 Ch. D. 395

served, or whether the work to be done was being done under compulsion. And this order would not in my opinion, as against the defendant, get rid of the defect of a bad notice, or make the service of it good if it was not already so. There are modes of service of such a notice provided in sect. 267 of the Public Health (Ireland) Act, 1878; none of these was complied with. They do not exclude all other modes of service, as is shown in *Mason v. Bibby* (1), decided under the English Public Health Act of 1848 (2). But in this case what service was there upon the owner at all? If the work had not been done, could the sanitary authority, upon such a notice, served in the way in which it was served, have obtained an order against the minor plaintiff under sect. 112 of the Act? In my opinion they could not, and if they could not then the work was not done and the money was not expended under such compulsion as made it an "imposition" within the meaning of the defendant's covenant.

Solicitor for the plaintiff: *James F. Power.*

Solicitor for the defendant: *J. J. Kennedy.*

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(1) 2 H. & C. 881.

(2) 11 & 12 Vict. c. 63.

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June 1, 19.

CARLISLE *v.* ORR (1).

(1917. No. 2999.)

Cause of Action—Alleged felony—No Prosecution—Infant plaintiff.

In an action by an infant plaintiff, suing by her next friend, the statement of claim averred that "the defendant assaulted and beat the plaintiff, who then was an infant, under the age of sixteen years, and then and there had carnal knowledge of her." The defendant moved to stay proceedings on the ground that the only cause of action disclosed by the statement of claim was a felony, for which the defendant had not been prosecuted.

Held, by the Court of Appeal (affirming the King's Bench Division), that the statement of claim did not unequivocally or necessarily charge a felony, and that the Court, in the exercise of its discretion, ought not to stay proceedings.

Smith v. Selwyn, [1914] 3 K. B. 98, distinguished.

NOTICE OF MOTION on the part of the defendant for an order that all proceedings in the action be stayed on the ground that the proceedings were an abuse of the process of the Court, and that the only cause of action disclosed by the statement of claim was in respect of an alleged felony for which the defendant had not been prosecuted.

The statement of claim, which was delivered on the 17th of April, 1917, was as follows:—

"1. In July, 1912, at No. 7 Crumlin Road, in the county of the City of Belfast, the defendant assaulted and beat the plaintiff, who then was an infant under the age of sixteen years, and then and there had carnal knowledge of her.

"2. In consequence the plaintiff suffered great physical pain and mental distress, and incurred expense for medical attendance, and the plaintiff claims £1,000 damages."

The defendant, in an affidavit, submitted that the allegations in the statement of claim meant that he had been guilty of a felony, and stated that no prosecution of any kind was ever

(1) In the King's Bench Division before GIBSON and DODD JJ.

brought against him in respect thereof. The plaintiff in her affidavit stated that she was advised, and believed that the assault complained of constituted a misdemeanour, and that therefore a criminal prosecution was not an essential preliminary to her bringing the action, and further, that the time within which criminal proceedings should have been instituted had long since expired. She stated that at the time of the said assault she was an infant under the age of sixteen years, and that it was not until recently that she became aware of her right of action against the defendant.

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D. M. Wilson K.C. and *Wm. Beattie*, for the defendant.

J. Williamson K.C. and *Wm. Lowry*, for the plaintiff.

The arguments were similar to those in the Court of Appeal.

GIBSON J. :—

The motion is based on two propositions: (1) that the claim imports absence of consent and should be construed as charging rape; (2) that on the pleading so construed the defendant is entitled to have the action stayed till a prosecution is brought and disposed of, the principle of law being that a party injured by a felonious act cannot obtain civil redress till public justice is satisfied. In the old cases the felonious character of the conduct founding the action was disclosed by the evidence at the trial, when it became, as was then held, the duty of the judge to non-suit, the action having been prematurely brought. This, the logical course, but difficult in application, is now supposed to be displaced by substituting a motion to stay in the interest of the defendant. As the defendant could not plead his own felony as a defence, such motion must necessarily be founded on the pleading or on evidence given by the plaintiff, whether by affidavit before the trial, or at the trial itself. Such motion treats the action as rightly brought but suspended in operation. Though some misdemeanours, for example under the Whiteboy Act, 1 & 2 Wm. IV, c. 44, involved punishment for life, the suspension of the civil remedy was confined to felony, whether because felony was a capital offence, or because it caused forfeiture (now removed), which Blackstone thought was the true criterion of felony.

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or because the trespass was drowned in the felony. In *Crosby v. Leng* (1), even after acquittal, the point was relied on as a ground of non-suit. The ancient law is discussed in Pollock and Maitland, ed. 1895, at pp. 465 and 509. The rule had the result that if the felon was convicted, his death by execution killed any right of personal action, and in other actions the property off which a judgment could be levied was swept away by forfeiture. The victim's civil rights could only receive pecuniary effect by giving a non-felonious character to the transaction, or by a verdict of acquittal. Public policy of encouraging prosecution would thus seem to be prejudiced rather than forwarded by making the criminal charge precede the civil. The real foundation for the rule was probably the interest of the King in forfeiture, as to which an exception was made in larceny to the limited extent of restitution of specific stolen property, ordered by statute to be given to the prosecutor by way of reward for performance of his duty. The venerable rule still survives, though the original reasons for it have long since disappeared.

The motion is based on *Smith v. Selwyn* (2), where the Court construed the claim as charging felony, and held that an application to stay was competent and proper. The pleading before us does not aver consent or absence of consent. It appears directed rather to a misdemeanour under sect. 5 of the Act of 1885, 48 & 49 Vict. c. 69, than to the felony of rape. It is said by Mr. Wilson that a claim founded on assault and carnal knowledge necessarily connotes absence of consent. I agree with this, apart from statute. Where a consensual act causes a breach of the peace, as in a prize fight or duel, consent is of no avail, but injury thence arising cannot support a civil action by a *particeps criminis*, not only from the principle *volenti non fit injuria*, but from the act consented to being criminal. Here consent was made impossible by statute. The assault may not be the less an assault because there was a prohibited consent. The girl was within the Children Act, 1908, and belonged to a protected class, to which *Browning v. Morris* (3) and *Kearley v. Thomson* (4) may apply. It would be

(1) 12 East, 409.

(2) [1914] 3 K. B. 98.

(3) 2 Cowper, 790, at p. 792.

(4) 24 Q. B. D. 742, at p. 746.

improper to pronounce a positive opinion on this question of the effect of consent in the present action, as the point must be decided later on before the judge at the trial and the Court in banc. Sect. 5 only gives conditional protection; the person charged can rely on consent where he believed on reasonable grounds that the girl was of the age of sixteen. The claim is consistent with acts constituting criminal misdemeanour, and the motion fails.

Construing it as charging felonious intercourse, and recollecting that, under sect. 9, on an indictment for rape the accused (subject to the time limit) might be convicted of misdemeanour, I think the motion must also be refused. The plaintiff's age makes it impossible to attribute to her default in performing the public duty. Default is considered the ground for applying the rule by Cockburn C.J. in *Wells v. Abrahams* (1), by Lord Parker in *Admiralty Commissioners v. SS. "Amerika"* (2), and by Swinfen-Eady L.J. in *Smith v. Selwyn* (3), where he quotes Lush J.:—A young person within the protection of the Children Act can hardly be supposed to be guilty of such a breach of duty. At this distance of time, the Attorney-General, who prosecutes in cases of this type, would not direct any prosecution. *Smith v. Selwyn* (4) dealt with wholly different facts.

Taking it that a motion to stay is now the appropriate procedure, such motion before the trial must depend on the pleadings or facts admitted by the plaintiff; for defendant could not set up his own felony as a ground for suspending the action. It seems curious that, though neither conviction nor acquittal, as *res inter alios acta*, legally affects the civil trial, and though the defendant's motive is not solicitude for the claims of public justice but self-interest, such motion should be competent. In the cases before *Wells v. Abrahams* (1), either the judge at the trial (as in *Crosby v. Leng*) (5) made the point, or defendant's counsel raised the objection after trial on a new trial motion. The question was decided as matter of law by the judge and the Court. The allowance of the objection disposed of the action as having been

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(1) L. R. 7 Q. B. 554, at p. 557.

(2) [1917] A. C. 38, at p. 50.

(3) [1914] 3 K. B., at p. 106.

(4) [1914] 3 K. B. 98.

(5) 12 East, 409.

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prematurely brought. The idea never occurred to the Court in those days that the action could be treated as properly brought, but that it could be suspended by an interlocutory motion by defendant—a motion not then subject to appeal—though probably, if the plaintiff had been so unwise as to charge felony in his pleading, the writ might have been set aside as an abuse of legal process. A motion which depends on the way the pleading is framed has little to recommend it on the grounds of public policy. The plaintiff need not describe the assault in the terms of felony; the pleading could be amended, and the distinctions between felony and misdemeanour on which the rule was based no longer exist. The Court, in applying this age-worn rule which still abides with us, should only act in a clear case where public justice manifestly requires the plaintiff to prosecute or bring the matter before the public prosecutor. Before a personal action can be suspended, depending as it does on the continued lives of the plaintiff and defendant, the Court should consider all the circumstances—the age of the plaintiff, the nature and surroundings of the alleged felony, whether there was a duty to prosecute, and whether such a prosecution was reasonably likely to have any result. It is only from the accident that the claim has been drafted in this shape that the present motion has been made possible. Reading it as imputing rape and not misdemeanour, I am of opinion that there are no grounds for granting it. The motion must be refused with costs.

With regard to Lord Campbell's Act, which brings death caused by felony into the new actionable remedy, I think it throws no light on the question now argued. The statute imposed a time limit; at that date the received view was that an unprosecuted felony prevented any action from being brought or maintained, so that it might be too late to sue if the prosecution had first to be disposed of; and the accepted doctrine was that felonious death could not found any civil complaint. These considerations would explain the express provision in the Act for a limited purpose; that provision does not affect the general legal principle applicable to civil redress in respect of felonious acts apart from statute.

Dodd J.:—

I adopt the principle laid down by Gibson J., and I also adopt his reasoning, but I wish to say I recognize the binding authority of *Smith v. Selwyn* (1). The principle that the King's justice prevails over all private rights remains a part of our law, but the procedure for enforcing it has been altered. The question is, when and by whom is this rule of common law laid down by the various authorities to be put in force? It cannot be raised—1, by a plea in bar; 2, by a plea in abatement; 3, by a dilatory plea. The last is just barely possible, but I do not see how it could be tried. The matter must be in the judge's discretion. At one stage of our law the judge enforced the principle. But there is a power of expansion in our law. Common law principles are perpetually made to apply to altered modes of life. Many changes have taken place. Forfeiture, for instance, is abolished. Mr. Lowry argued that the King's peace and purse were involved in the principle.

In early days there were no Budget, no estimates, no public prosecutor. The judge thought he was the custodian of the King's peace and purse, and entitled on his own initiative to enforce this rule laid down to protect them. But the time when the Court would take the initiative is gone by. Even in the case of contempt of Court, committed in face of the Court, the Court brings the matter to the notice of the Attorney-General; and I think when this principle is to be enforced in this country, it should be enforced by the Attorney-General. It was decided in this Court that judges will not interfere unless they are put in motion.

It shows how far the application of the old rule is modified, that the defendant is now permitted to bring a motion to stay proceedings. If he could show that he was prejudiced by the frame of the action, this Court would give him relief; but it is not suggested that he is in any way affected. It is putting it too high to say that the Court must stay the proceedings. In a fit case it will do so; but to say that the rule should be applied to a young girl, who has no power to sue in her own name, bringing

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(1) [1914] 3 K. B. 98.

K. B. Div. an action for assault, is to fall back upon legal technicalities equally
1917. dissociated from law and from justice.

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Our decision does not really conflict with the decision in *Smith v. Selwyn* (1). In that case there were allegations of four felonies, and it would puzzle anyone to say what the cause of action was. The judges might have sent the case to the Old Bailey, but they preferred to say "strike out the charges of felony." In other words, it was a pleading matter, that could be got rid of by an amendment of the pleadings. We will not decide affirmatively on the question of consent, raised by the pleadings on this interlocutory motion. The judge has complete jurisdiction over pleadings and evidence. To suggest that fraud vitiates consent does not apply to such a case as this. See per Stephen J., *R. v. Clarence* (2):—"These illustrations appear to show clearly that the maxim that fraud vitiates consent is too general to be applied to these matters, as if it were absolutely true. I do not at all deny that in some cases it applies, though it is often used with reference to cases which do not fall within it. For instance, it has nothing to do with such cases as assaults on young children." But submission is not consent.

In *R. v. Martin* (3) the judge left the issue to the jury, whether the girl consented. We should be careful to hold our hands as to this question. This is a common law action of assault, and what is set forth in the pleadings is only matter of aggravation. If the simple Bullen and Leake pleading for assault had been adopted, this motion could not have been brought.

A. E. C.

May 31.
June 1, 19.

The defendant appealed (4).

D. M. Wilson K.C. and *William Beattie*, for the appellant.

The alleged cause of action is for assaulting and beating the plaintiff, being an infant under sixteen years, and having carnal knowledge of her. In law this claim necessarily means that the acts complained of were done without the plaintiff's

(1) [1914] 3 K. B. 98. (2) 22 Q. B. D. 23, at p. 43. (3) 9 C. & P. 213.

(4) In the Court of Appeal, before O'CONNOR, M.R., and RONAN and MOLONY L.JJ.

consent: *Christopherson v. Barde* (1); *Hegarty v. Shine* (2). The claim, therefore, charges the defendant with rape, which is a felony, and the plaintiff is making use of the process of the Court to get damages for this felony. The affidavit proves that the defendant has never been prosecuted for this alleged felony. Many cases show that there is a rule of law that the Court will not permit a plaintiff to bring an action for damages founded on a tortious act, which amounts to a felony, until public justice has been vindicated, and the alleged felon has been prosecuted, or a reasonable excuse shown for his not having been prosecuted. As a rule the Court cannot be aware that the civil action is founded on an unprosecuted felony until the facts appear at the trial; but, when the facts do so appear, the judge is bound to non-suit the plaintiff under the old practice: *Quinlan v. Barber* (3); *Hayes v. Smith* (4); *Wellock v. Constantine* (5); and, as non-suits are now abolished, such an action, if brought to trial, must now be dismissed, and judgment given for the defendant, or a special order made, giving the plaintiff leave to discontinue on payment of costs.

The rule of public policy is stated in *Stone v. Marsh* (6) and *Crosby v. Leng* (7), and was adopted by the House of Lords in *Marsh v. Keating* (8), where the plaintiff was allowed to recover because the felon had already been convicted of a similar forgery, and executed, and therefore, could not be prosecuted for the forgery out of which Marsh's cause of action arose. In *Wells v. Abrahams* (9), as the judge who tried the action was merely a commissioner to try the issues joined between the parties, it was held that such a commissioner had no jurisdiction to non-suit the plaintiff, and the verdict for the plaintiff was allowed to stand, but the rule of law was admitted to exist.

Again, in *A v. B* (10), the question was debated on a motion to postpone the trial, and get a witness examined on commission. The decision was merely a refusal of the motion; but Holmes J. says that "at all times there was considerable doubt as to how

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(1) 11 Q. B. 473.

(2) 4 L. R. Ir. 288, at p. 296.

(3) Batty's Rep. 47.

(4) Smyth & Batty's Rep. 378.

(5) 2 H. & C. 146.

(6) 6 B. & C. 551.

(7) 12 East, 409.

(8) 1 Bing. N. C. 198.

(9) L. R. 7 Q. B. 554.

(10) 24 L. R. Ir. 235.

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the rule should be enforced, and latterly the soundness of the rule itself has been called in question." Johnson J. and Morris C.J. say that they would not decide the point, as there was no application before them to stay the action on the ground of felony; and O'Brien J. says "that where the Court, from information before it, sees that acts of a grave criminal nature are charged against a party in a civil action, it will, in view of the enormous importance of the matter to the administration of justice, restrain the proceedings until the criminal matter is disposed of.

It is submitted that the view of O'Brien J. is the correct view. The only way to punish the criminal, and to properly repress such crimes is to prosecute the alleged criminal. If the rule is to be abolished, and parties are allowed to take payment or recover damages for such crimes without prosecuting the criminal, this amounts to permission to compound the felony, and to use the process of the Court to enable such compounding of the felony to be legally carried out. The criminal escapes his proper punishment, and the law ceases to give proper protection to the young children of the necessitous classes, and these crimes will necessarily increase. Such cases are brought to the notice of the Courts only in a very small percentage of the cases which actually occur, and then only by reason of special circumstances. The point has not been before a Court in Ireland in any reported case since *A v. B* (1) in 1889.

If the Court refuses to act on the rule when they are cognizant of the facts, the rule is abolished for all practical purposes. The Court of Appeal in England, in *Smith v. Selwyn* (2), after a full argument, decided that the proper course for the Court to adopt in such a case was to stay all further proceedings in the action until the defendant had been prosecuted. In that case the Court did stay all further proceedings in the action, but gave plaintiff leave to amend his statement of claim by reducing his claim to a misdemeanour instead of a felony (if possible). This was criticized by Lord Parker in *Admiralty Commissioners v. S.S. "Amerika"* (3), who, at p. 43, mentions the rule of public policy, "which, in cases of felony, admittedly requires the person

aggrieved to institute criminal proceedings before pursuing any civil remedy against the felon"; and says, at p. 50, "Supposing the statement of claim had been amended in the way suggested, it would still seem that, under the authorities I have cited, public policy would, if there had been an actual felony, demand a stay until the plaintiff had done her duty by prosecuting the felon."

Here there is no excuse for not having prosecuted the felon, for the alleged felon is neither dead nor out of the jurisdiction. The plaintiff's non-age is no excuse, for the same information which has been given to the plaintiff's solicitor to bring this action would, if given to the authorities, presumably have resulted in a prosecution. The onus of prosecuting was thrown on the plaintiff in England at a time when prosecutions were generally private prosecutions. In Ireland the onus is much lighter, for, in a genuine case, the Crown, on proper information, undertakes the expense of the prosecution. At the time *Smith v. Selwyn* (1) was decided there was a public prosecutor in England.

It is no answer to this motion to say that the action is for both an assault and a rape, or that the action is for an assault aggravated by rape—for the rule of public policy requires that before pursuing any civil remedy against the felon, the person aggrieved should institute criminal proceedings against the felon. The plaintiff must be bound by her allegations in her pleadings, and it is clear that she is trying to get damages or an increase of damages by reason of the rape. The rule of public policy would be ludicrous if it means that the Court will stay an action if it claims damages for a felony against the felon, but not if the claim also includes a demand for goods sold and delivered or money had and received. The evil to prevent which the rule exists, viz., getting money for the felony without getting the felon punished for his crime would thus go unchecked. Nor is it any answer to say that the plaintiff at the trial may prove merely an assault less than a felony, for the Court is now cognizant of the fact that at present its process is being used to get damages for the felony, and this is an abuse of the process of the Court, and the action ought to be stayed until at least the portion of the claim (if, indeed, the claim is severable at all) relating to the felony is struck out.

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It has been suggested that, Stead's Act having made carnal knowledge of a girl under sixteen years of age a misdemeanour, the statement of claim is consistent with the fact that the plaintiff consented to the acts complained of. It is submitted that this is not the proper legal construction of the statement of claim for the reasons already given. A girl under sixteen years of age, and even much younger, can consent to carnal knowledge: *R. v. Martin* (1); and it was because she could so consent that Stead's Act and the similar Acts prior to it were passed. These Acts merely made a statutory offence, but in no way extended the civil remedies of a person who consented to such an act. The plaintiff is in this dilemma: either the acts complained of were done against the plaintiff's consent and amount to a felony, or they were done with her consent and she has no cause of action. Lord Parker in *Admiralty Commissioners v. SS. "Amerika"* (2), speaking of *Wellock v. Constantine* (3), says: "Of course if she had consented to the act alleged, there could be no civil remedy. If, on the other hand, she had not consented, she was in fact complaining of a felony." Again, if the plaintiff alleges that the acts complained of were done with her consent, she cannot maintain this action: *Satterthwaite v. Dewhurst* (4). "The cause of action is a turpis causa incapable of being made the foundation of an action," per Palles C.B., *Hegarty v. Shine* (5). The action should be stayed because it claims damages for an unprosecuted felony, and the rule of public policy laid down by Lords Tenterden and Ellenborough, and recognized by Lord Parker and O'Brien J., is sounder and more calculated to repress these crimes, by ensuring the punishment of the criminal, than its suggested abrogation, which enables these crimes to be committed with impunity so long as money is paid for them, and actions can be brought and settled and the process of the Court used as a cloak for compounding felonies, notwithstanding the fact that such compounding of felonies is itself a crime. A felon is not allowed to allege his own crime, but here it is the plaintiff who alleges the felony, and the alleged felon only says he has never been prosecuted for it.

(1) 9 C. & P. 213.

(4) 4 Douglas, 315.

(2) [1917] A. C., at p. 48.

(5) 4 L. R. Ir., at p. 299.

(3) 2 H. & C. 146.

J. Williamson K.C. and *W. Lowry*, for the respondent :—

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All the cases quoted clearly involved a charge of felony. The statement of claim in this case does not necessarily involve such a charge. Even if it did, there is reasonable excuse for not prosecuting. At the time of the assault plaintiff was an infant of fifteen years, and it is not reasonable to expect that she should then prosecute, and the duty is not cast upon a next friend. A next friend does not come into existence until after the institution of civil proceedings. Moreover, the practice in England as to the institution of prosecutions differs from that in Ireland. In this country the Attorney-General prosecutes, and a private prosecution is practically unknown.

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The rule that a felony must be prosecuted before being made the subject of civil proceedings had its origin in the former consequences of a conviction for felony, viz., forfeiture of lands and goods. No such consequences followed on a conviction for a misdemeanour. The rule protected the revenue. These consequences of felony were abolished by 33 & 34 Vict. c. 23. No distinction can be drawn between felonies and misdemeanours on the ground of gravity. Public policy requires the punishment of both. A rule of public policy which can be evaded by an amendment in pleading does not seem to be very cogent.

The allegation as to carnal knowledge is made by way of aggravation of damages. If carnal knowledge is proved, that fact may affect the jury in assessing the amount of damages; but if it cannot be proved, the plaintiff is still entitled to damages for an assault. [They referred to the following authorities: *Wells v. Abrahams* (1); *Kearley v. Thomson* (2); *The Queen v. Clarence* (3).]

Beattie, in reply.

O'CONNOR M.R. :—

June 19.

This is an appeal from an order of the King's Bench Division refusing an application by the defendant that the proceedings in the action should be stayed. The application was made to the Court below in the following circumstances:—

By the statement of claim the cause of action is stated in these words: "In July, 1912, at No. 7 Crumlin Road, in the

(1) L. R. 7 Q. B. 554. (2) 24 Q. B. D. 742. (3) 22 Q. B. D. 23.

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county of the City of Belfast, the defendant assaulted and beat the plaintiff, who then was an infant under the age of sixteen years, and then and there had carnal knowledge of her."

On one, and perhaps the natural, construction of this averment, it is a charge that the defendant was guilty of the offence of rape against the plaintiff; and the defendant, so treating it, moved the King's Bench Division to stay the proceedings on the ground that the only cause of action alleged was a felony, for which the defendant had not been prosecuted. This motion was refused, and is the subject-matter of the present appeal.

The case has opened up a most interesting chapter in the history of English law. The right to bring a civil action for a wrong which amounts to a felony has for generations of lawyers been a subject for discussion. I do not, however, consider it necessary for the purposes of the present case to trace the origin of the question, or to give a complete historical account of how it was dealt with. That would not be profitable in view of modern judgments by most eminent judges who have fully reviewed this chapter in legal history.

I think it will be sufficient if I commence by referring to the legal principle which must now be held to govern all discussion on private rights in respect of a wrong which amounts to a felony. The principle is this—that the policy of the law requires that before the party injured by any felonious act can seek civil redress for it, the matter should be heard and disposed of before the proper criminal tribunal, in order that the justice of the country should be first satisfied. This is the dictum of Lord Ellenborough in *Crosby v. Leng* (1), and I do not think it has ever been disputed. The same principle has been enunciated by Lord Tenterden in *Stone v. Marsh* (2), where he states the law to be this: "There is indeed another rule of the law of England, viz. that a man shall not be allowed to make a felony the foundation of a civil action. . . . The rule is founded on a principle of public policy. . . . Now public policy requires that offenders against the law shall be brought to justice, and for that reason a man is not permitted to abstain from prosecuting an offender by

(1) 12 East, 409.

(2) 6 B. & C. 551.

receiving back stolen property, or any equivalent or composition, for a felony without suit, and of course cannot be allowed to maintain a suit for such a purpose."

This principle, laid down upon the authority of Lord Ellenborough and Lord Tenterden, has been recognized by the Court of Appeal in England (*Smith v. Selwyn* (1), judgment of Swinfen Eady L.J., p. 105), and by the House of Lords (*Admiralty Commissioners v. S.S. "Amerika"* (2), judgment of Lord Parker, p. 48). We may, therefore, take it that the principle is now well established, and cannot be disputed.

Indeed, I think I may say that the principle has never been in dispute, and that any controversy that has from time to time been raised around it was only concerned with the mode in which it should be applied. This was the question which exercised the Court of Queen's Bench in *Wells v. Abrahams* (3). That was an action for trover of a gold brooch which, on the evidence, was feloniously stolen by the defendant. The jury found a verdict for the plaintiff for £150. A rule was obtained for a new trial on the ground that the evidence tended to prove a felony. Cause was shown and allowed, but the judgments only condemn the mode in which it was sought to put the principle in action, and not the principle itself. Cockburn C. J., said: "No doubt it has long been established as the law of England that where an injury amounts to an infringement of the civil rights of an individual, and at the same time to a felonious wrong, the civil remedy—that is, the right of redress by action—is suspended until the party inflicting the injury has been prosecuted. But although that is the rule, it becomes a different question when we have to consider how it is to be enforced. It may be that the person, against whom a prosecution for felony is pending, may have a right in an action to show by plea that he is in the position of a felon, and so he may be able to stop the action brought by the person injured by his felonious act, although I think this is open to doubt, because the effect would be to allow a party to set up his own criminality. But it may very well be that if an action were brought against a person who was in the course of

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being prosecuted for felony, the summary jurisdiction of this Court might be invoked to stay the proceedings which would involve an undue use, probably an abuse of the process of this Court, in which case the Court is always willing to interfere to prevent such abuse. It may be—I do not say it is so—that, if a person neglecting his duty to prosecute for an offence committed against him, were to bring an action instead of prosecuting, the Court might be called upon to intervene, and to prevent the plaintiff obtaining by judgment and execution the fruits of the action thus improperly brought; but it is unnecessary now to consider in what way this rule of law might be enforced.”

He was followed by Blackburn J., who said: “No doubt that there are many dicta of high authority to the effect that when there has been a private injury to a civil right, which may also be the subject of criminal prosecution for felony, it is the duty of the person injured to prosecute for the criminal offence before he can pursue his remedy by action for the private injury. But although there are many dicta to that effect, I cannot find any case where that rule of law has been acted on before the cases of *White v. Spettigue* (1), and *Gimson v. Woodfull* (2). While the law throws the prosecution of criminal offences on private individuals, it may be, in some cases, that the civil remedy is suspended until there has been a prosecution for the felony. I am not prepared to say that, if an action were brought against a defendant, and it was stated by the Attorney-General on behalf of the Crown that criminal proceedings were pending, and the action was brought with an intention of compromising the felony, the Court might not, in such a case, in the exercise of its summary jurisdiction, stay proceedings in the action until the indictment for felony had been tried; or if an action were brought contemporaneously with an indictment for felony, and was an attempt to extort money, then again it might be that the Court would stay proceedings. I am not aware that such cases have arisen, and I am not to be understood to say a proper case might not arise in which the Court might interfere.”

Lush J. said:—“It is undoubtedly laid down in the text-books that it is the duty of the person who is the victim of a

(1) 13 M. & W. 603.

(2) 2 C. & P. 41.

felonious act on the part of another to prosecute for the felony, and he cannot obtain redress by civil action until he has satisfied that requirement; but by what means that duty is to be enforced, we are nowhere informed."

The case, then, stood in this way. The Court was satisfied that a civil action should not be brought until there had been a prosecution for the criminal charge; but that felony could not be set up as a defence, and that the only way that could be suggested of putting the principle in force would be by staying the proceedings. This appears to be the first time such a suggestion was made. This was in the year 1872. Next came the judgment of Bramwell L.J., in *Ex parte Ball* (1), and, suffice it to say that while that learned judge did not dispute that the felonious origin of a debt is in some way an impediment to its enforcement, he could not say what that way was. He was not even satisfied with the suggestion of a stay of proceedings which was made in *Wells v. Abrahams* (2).

So the law stood until there came the judgment of the Court of Appeal in *Smith v. Selwyn* (3). That was an action by husband and wife, claiming damages for a felonious assault committed by the defendant upon the wife. The defendant moved to stay the action on the ground that the statement of claim was based on a felony. In substance, an order was made to stay all further proceedings on the statement of claim. Kennedy L.J., said: "It is not easy to find a statement, in any case, as to what is the course which the Court ought to adopt in a matter of this kind. Some of the decisions are not easy to reconcile. This, however, is certain, that the Court has a right, if not an imperative duty, to stay the proceedings in a civil action for damages, if it is clear that that which is the basis of the claim in the action is a felony committed by the defendant against the plaintiff."

Swinfen Eady L.J., in giving judgment, said—"It is well established that, according to the law of England, when injuries are inflicted on an individual under circumstances which constitute a felony, that felony cannot be made the foundation of a civil action at the suit of the person injured against the person who inflicted the injuries until the latter has been prosecuted or a

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(1) 10 Ch. Div. 667. (2) L. R. 7 Q. B. 554. (3) [1914] 3 K. B. 98.

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reasonable excuse shown for his non-prosecution." Then, after dealing with the judgments in *Wells v. Abrahams* (1), he said—"We have now to lay down the proper course of procedure in such a case. The proper course is, in my judgment, that indicated by Cockburn C.J. in the passage I have cited, that is to say to stay the action if the present statement of claim is persisted in."

We have it, then, laid down for the first time authoritatively what is the procedure for enforcing the principle involved in cases like the present. Ought this action, then, to be stayed? If the statement of claim stated a felony as clearly and unmistakably as the statement of claim in *Smith v. Selwyn* (2), I would be of opinion that the action should be stayed; but although the apparent meaning is a charge of rape—and that may be the fair meaning—it is susceptible of another construction, which might reduce the charge to one of misdemeanour. We have not here the apt words for an indictment for rape. It is not alleged that the defendant violently and against the plaintiff's will had carnal knowledge of her, as was alleged in *Smith v. Selwyn* (2). Again, the introduction of the age of the plaintiff suggests that it was some statutory offence of indecency which might be only a misdemeanour which was in the mind of the pleader.

It must be borne in mind that the remedy of staying an action on the ground that the cause of action is a felony is an unusual process, and a relief sought by a person who presumably is guilty of the felony. He could not plead the felony as a defence—"nemo allegans suam turpitudinem est audiendus"—a maxim which makes me entertain a doubt of the soundness of the procedure laid down in *Smith v. Selwyn* (2), and leads me to think that possibly the more wholesome practice would be to allow the stay to originate with the Court itself on hearing all the facts at the trial. We ought, therefore, to be slow to put a stay on an action on the ground that a felony is charged unless we are satisfied that the claim is one for felony and nothing else. Moreover, the remedy of staying proceedings is the most drastic one available for getting rid of an action; and it lies upon the defendant to show conclusively that the case which the plaintiff makes is one of felony, and cannot be anything else.

(1) L. R. 7 Q. B. 554.

(2) [1914] 3 K. B. 98.

Before concluding, I wish to notice an argument which was urged by the respondent, and seems to have prevailed in the Court below. It was that the plaintiff in the action being an infant, was, if not entirely, at least to some extent, relieved from the rule which prohibits the bringing of a civil action in respect of a felonious wrong until the wrong-doer is prosecuted criminally. This privileged position is claimed for an infant, because the rule is alleged to proceed from a duty cast on the plaintiff, and an infant cannot be charged with the performance of a duty. No doubt, the duty of the person injured by a felony to prosecute before he can pursue his remedy by action is stated by Blackburn J. in *Wells v. Abrahams* (1); but I think that the real reason at the basis of the rule is that stated by Lord Tenterden in *Stone v. Marsh* (2), already referred to. It is that a man is not permitted to abstain from prosecuting an offender by receiving back stolen property or any equivalent or composition for a felony without suit, and, of course, cannot be allowed to maintain a suit for such a purpose. This principle must bind an infant just as fully as it does an adult. An infant acts through his next friend, and it cannot be said that a next friend can compound a felony by receiving compensation. If he cannot do so, neither can he bring a suit to enforce compensation. An infant is not privileged to compound a felony through his next friend. I think, therefore, that the infancy of the plaintiff in a case like the present does not afford any place of privilege; and he is just as much bound as a person of full age, with a full sense of duty, and having capacity to perform it.

Neither do I think that the rule of law as it has been laid down for England is inapplicable in Ireland because of any difference in practice between the two countries in the institution of criminal prosecutions, whether it is the party injured who is the prosecutor or the Attorney-General, on the information of the party injured, the rule seems to me to apply. If a party injured withholds information from the Attorney-General which would lead to a prosecution, and brings a civil action for the wrong committed, he is just as much engaged in compounding a felony as if it was his duty to prosecute personally. However, these latter questions do not require decision on the view I have taken, that the motion to stay the proceedings in the present case was rightly refused.

(1) L. R. 7 Q. B. 554.

(2) 6 B. & C. 551.

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RONAN L.J. :—

Until the case of *Smith v. Selwyn* (1) no such order as is sought in the present case was ever made in England : Pollock on Torts, 9th edition, p. 207, quoted in *Smith v. Selwyn* (1) at p. 102 ; this, as far as I can see, is not disputed. It is not suggested that any such order has ever been made in Ireland. Up to the present, therefore, the rule when applied has been applied at or after the trial. As Gibson J. says, "The question was decided as matter of law by the judge and the Court." This involves the decision of the incidental question whether "a reasonable excuse was shown for his non-prosecution" : Swinfen Eady L.J. in *Smith v. Selwyn* (1), at p. 105.

It is quite clear that any order of this Court on the present motion would be final, and not subject to appeal to the House of Lords. The order of the English Court of Appeal in *Smith v. Selwyn* (1) was subject to appeal to the House of Lords (Appellate Jurisdiction Act, 1876, sect. 3, sub-s. 1). The course taken by the English Court of deciding these questions of fact and law on motions did not deprive the party of his right of having the decision reviewed by the House of Lords. If we adopted this course instead of allowing the matter to be tried as heretofore at or after the trial, we should be depriving the party of his right of appeal to the House of Lords, and thus making our own decision final. The limited right of appeal to the House of Lords given by sect. 86 of the Irish Judicature Act, 1877, has made the proviso to sect. 48 of vital importance. It is that proviso which really preserves the right of appeal in such questions as the present, when disposed of at or after the trial. There was no corresponding provision in the English Act of 1873, but sect. 22 of the Act of 1875 corresponds to the proviso. Our courts have been most careful not to make orders on motion which would have the effect of depriving parties of the right of appeal to the House of Lords. For instance, they have often allowed the writ to issue in cases of mandamus where there were only questions of law involved, because if they decided the questions on motion, sects. 48 and 86 would not apply, and the questions of law could not be taken to the

(1) [1914] 3 K. B. 98.

House of Lords. A striking instance arose in the case of the Belfast Revaluation, where the Lord Chief Baron, giving the judgment of the King's Bench Division, declined to grant a certiorari because there would be no appeal to the House of Lords, but put the parties to bring an action, and state a case so as to enable them to have the decision of the House of Lords on the question. The same thing was done in the Trinity College Rate case. When English cases have been cited, cases showing that serious questions of fact and law have been decided on motion, I have often heard judges in this Court, and in the King's Bench Division, and especially the Lord Chief Baron, point out that the great objection to taking this course in Ireland, is that it prevents an appeal to the House of Lords, does not exist in England.

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For these reasons I am of opinion that, having regard to the difference between the law in this country and the law in England as to appeal to the House of Lords, we should not adopt the new procedure introduced by the case of *Smith v. Selwyn* (1) as a general rule. I do not say that, in special circumstances, the Court might not stay the action on motion.

In the next place, assuming that *Smith v. Selwyn* (1) should be adopted in Ireland, I am of opinion that it does not govern the present case. In the leading judgment, Kennedy L.J., at page 103, says:—"In my opinion, the result of them (the authorities) is this: It is in the power of the Court to grant a stay, and it is the duty of the Court to consider in each case whether in the circumstances it will grant a stay, if it sees that the claim for damages is based upon a felony committed by the defendant." Accepting this proposition, the question in this case divides itself into two parts—(a) Is it clear that the claim is based upon a felony, and (b) if so, ought the Court, considering all the circumstances, to grant a stay? In *Smith v. Selwyn* (1) it was clear on the terms of sect. 22 of the Offences Against the Person Act, 1861, that the statement of claim was founded on a felony and nothing else, and that if the plaintiffs failed to prove a felony, they had no case whatever. The decision is based on this. In my opinion, the defendant in this case has failed to show that the plaintiff's case rests entirely on a felony.

(1) [1914] 3 K B. 98.

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The statement of claim may be said to be ambiguous ; but this is not a motion to set aside the statement of claim as embarrassing, nor is it a motion for particulars of the assault complained of. The defendant could, if he thought fit, have instituted either of these motions. It is a motion to stay the entire action. It is, as the Master of the Rolls has said, the most drastic proceeding that could be taken. Mr. Justice Dodd has said it is "a common law action of assault, and what is set forth on the pleading is only matter of aggravation. The words are 'assaulted and beat the plaintiff, an infant under the age of sixteen years, and then and there had carnal knowledge of her.'" The defendant argues that the words "then and there" show that the only assault or battery was the act of intercourse, and that, therefore, the case is within *Smith v. Selwyn* (1). His whole case rests on "then and there." I confess it seems to me impossible, on any reasonable construction of the language, to say that it even contains the essential averments in an indictment for rape, much less that it contains nothing else.

A fair test would be, to consider how the Court would treat it if this matter could be raised on demurrer. Prior to the Common Law Procedure Act special demurrers were allowed, and pleadings were ingeniously twisted to show that they could possibly bear a meaning which would make them bad. When the procedure of motions to set aside pleadings as embarrassing was established special demurrers were abolished. These motions were created as the proper remedy for ambiguity. The Irish law and practice since is thus stated in that most accurate of text-books, Bewley and Naish, at p. 77 :—"In this country the Courts have held that since the passing of the Act the rule is otherwise, and the pleading is to be construed in favour of the pleader ; in other words, if an allegation in a pleading is fairly susceptible of two meanings, one of which will make the pleading bad and the other good, that construction is to be preferred which will make the pleading good."

I am, therefore, of opinion that the defendant has failed to show that this is an action "based on a felony," and that the case is not within *Smith v. Selwyn* (1). In the next place, even if

(1) [1914] 3 K. B. 98.

it were, it would then be, in the words of Kennedy L.J., "the duty of the Court to consider whether in the circumstances it would grant a stay."

For the reasons given by the Master of the Rolls and the judges in the Court below and to be given by Lord Justice Molony, and particularly for the reasons I have mentioned relating to appeals to the House of Lords, I am clearly of opinion that we should not interfere with the order of the King's Bench Division in this case.

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MOLONY L.J.:—

This action has been brought by Agnes Carlisle, an infant, by James Carlisle, her father and next friend. The statement of claim alleges that in July, 1912, the defendant assaulted and beat the plaintiff, who was then an infant under the age of sixteen years, and then and there had carnal knowledge of her. The defendant moved to stay the proceedings on the ground that they were an abuse of the process of the Court, and that the only cause of action disclosed by the statement of claim is in respect of an alleged felony, for which the defendant has not been prosecuted. The King's Bench Division refused to stay the proceedings, and the defendant has brought the present appeal.

The main question to be determined in this case is as to whether the statement of claim necessarily charges the defendant with the commission of a felony. The defendant has strongly relied on the case of *Smith v. Selwyn* (1) as an authority for staying proceedings in any case where the action for damages is based upon a felonious act on the part of the defendant. In that case, however, it was clear from the statement of claim that the defendant was alleged to have committed a felony, and that the words were not reasonably capable of any other interpretation. In the present case the cause of action is stated to be an assault; and the facts (*a*) that the plaintiff was an infant under the age of sixteen years, and (*b*) that the defendant had carnal knowledge of her, are put forward as matters of aggravation.

(1) [1914] 3 K. B. 98.

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Supposing that the assault was proved, and that the carnal knowledge was disproved, it would still be open to a jury to give damages for the assault. I rather think that the pleader deliberately avoided making a direct allegation of rape, because he does not say that the carnal knowledge was against the will of the plaintiff, and the fact of mentioning her age as being under sixteen points rather to the statutory misdemeanour under sect. 3 of the Criminal Law Amendment Act, 1885. Even where, as in *Smith v. Selwyn* (1), the felony was charged in direct terms, leave was given to amend, because, as Lord Justice Kennedy said in his judgment, "we ought, however, to give the plaintiffs an opportunity of alleging as a ground of their claim to damages an assault on the female plaintiff which will amount to a misdemeanour only."

I think, therefore, that this Court, in the exercise of its discretion, ought not to stay proceedings in the present case; but our decision does not interfere with the discretion of the judge at the trial to do so, in the event of it being then proved that the tort in respect of which the damages are claimed was, in fact, a felony, and that there was no reasonable excuse for not prosecuting, or for not giving such information to the proper authorities as would enable a prosecution to be brought.

Solicitor for the appellant: *Gibson Barron*.

Solicitor for the respondent: *T. Erskine Alexander*.

C. L.

REX v. PATRICK McNICHOLL (1).

Cr. Ca. R.
1917.

Criminal law—Evidence—Murder—Confession—Corpus delicti—Dead body not found—Onus of proof.

July 30, 31.

On a trial for the murder of the infant illegitimate daughter of the accused, evidence was given that he had directly confessed to the actual commission of the crime, but the dead body of the infant had not been found. The jury found the prisoner guilty.

Held, that the judge (Gibson J.) had rightly refused to withdraw the case from the jury, that there was evidence upon which the prisoner could rightly be convicted, and that the conviction should be affirmed.

In a charge of murder, by proof of the corpus delicti is meant proof of the factum of murder, and that the accused committed the murder or took part in its commission. Such proof may be established by the confession of the accused without proof of the finding of the dead body.

The dictum of Sir Matthew Hale (*Pleas of the Crown*, 1778 ed., vol. ii, p. 290), that he "would never convict any person of murder or manslaughter unless the fact were proved to be done, or at least the body found dead," is not an inflexible legal maxim, but is a wise and necessary caution to be addressed by the presiding judge to the jury.

Dictum of Pales C.B. in *Queen v. Sullivan* (20 L. R. Ir., at p. 570), that the case of murder is an exception to the general rule of the common law, and that the confession of the accused is insufficient of itself to prove that the fact was done, unless there is proof of the finding of the dead body, dissented from.

CASE RESERVED pursuant to the statute in that behalf for the determination of the Court for Crown Cases Reserved by the Right Hon. Mr. Justice Gibson, at the Summer Assizes, 1917, for the County Londonderry.

The case set out as follows :—

This trial for the murder of Elizabeth McNicholl, the accused's illegitimate infant daughter, on April 27th, 1917, took place at the Londonderry Assizes, held on July 18th and 19th, 1917. *Mr. Wylie K.C.* and *Mr. T. Henry Maxwell* represented the Crown. *Mr. Henry K.C.* appeared for the accused. He called no evidence, and at the close of the Crown case required me to direct an acquittal.

(1) Before SIR JAMES CAMPBELL C.J., MADDEN, KENNY, DODD, PIM,
and GORDON JJ.

Cr. Ca. R. Besides the oral evidence there were letters from the prisoner
 1917. to Matilda (Tillie) Burke and Mrs. Irwin, Tillie Burke's sister.
R. The three first were directed to Drumcovitt, where Tillie and her
v. baby were staying with Mrs. Irwin; the next two were sent to her
 McNICHOLL at her mother's house, Oaks, between Claudy and Derry; and the last
 letter (the sixth) was written after the confession made on May 25th.
 The letters to her and Mrs. Irwin are set out in the Appendix.

The material dates are as follows:—Tillie Burke was employed as servant by defendant in 1915. Being enceinte by him, she left in May, 1916, to stay with her sister, Mrs. Curley, at Skeogh, Co. Donegal. Her child, Elizabeth McNicholl, was born on 28th November, 1916. She, with her baby, came to her sister Mrs. Irwin's house at Drumcovitt, March 20th, 1917. The child was vaccinated by Dr. Thompson, and registered in the name of Patrick McNicholl about a fortnight later. The child was taken by the prisoner on April 27th. Tillie Burke moved to her mother's house at the Oaks, near Claudy, on Tuesday, May 1st. Went into service at Culmore, on the Lough, some time after. Came home to the Oaks, her mother's house, by arrangement to meet defendant, who at the interview on May 25th said he had smothered the baby in the lane. Five letters were handed by Mrs. Irwin to the police on May 29th. The last letter to Tillie Burke handed to the police on June 2nd. Arrest of prisoner on June 2nd at his own place, Coolnaculpagh.

Mr. Wylie K.C. states:—

Matilda Burke examined.—Hired by prisoner early in 1915. Left in May, 1916. He seduced me. When I left I was bearing a child of which he was the father. I went to Skeogh, Co. Donegal. On 28th November, 1916, child born and baptized there, under name Elizabeth McNicholl. He knew that. He sent letters and money. Before Easter I came to my sister, Mrs. Irwin, to Drumcovitt. It was Claudy fair day, March 20th. I brought baby with me. On the second night after I came he visited me. I wrote to him I was coming. I had conversation with him. He spoke of our getting married, Easter Sunday, at Banagher, a mile beyond Feeny. A few days after I got a letter from defendant (No. 1). Identifies it. I answered it. Don't recollect what I

wrote. I think he wrote then, but he came a few days after. I said I wasn't willing to give up the baby. He said I would never see it again; he would take it away. I agreed he should take it away. He said Mrs. Donaghy, on Garvagh Road, three miles below Dungiven, a cousin, with one child and cows, was to take it; she would be fond of baby. Letter 2 received. Identified. Later I saw him at Drumcovitt. Moses Irwin, brother-in-law, was labourer, working for Mr. Craig living at Drumcovitt House. The lane from Irwin's runs past back entrance of Drumcovitt House to the road. Moses Irwin had three children, eldest aged seven or eight; youngest, six or seven months. I met him in the lane after letter 2. There was a quarrel about baby, which he said I would not see again. I said I wanted to see it when I liked. He said I could not, Mrs. Donaghy would be claiming it as her own. Letter 3 received and identified. He came a few days after and arranged to take away the child on Friday night between nine and ten; Mrs. Donaghy would have a motor. He said he would bring the child by the lane to the road where the motor would stay. On Friday he came at 10.30 p.m. Irwin and my sister were in bed and my baby in cradle. There is a kitchen and one room. Irwin and his wife with three children were in the kitchen. My mother and I were in the room and baby. Mother and I were up. Mother let him in. He said he was late, waiting for the trap; it wasn't a motor Mrs. Donaghy had, it was a trap; she was in it and the little boy driving it. Annie got up and dressed baby. It was fed with bottle. It was wrapped in the cradle blankets to keep it warm and my big yellow coat over it. The night was dry and cold, not freezing. I took it to the lane outside the house and gave it to Patrick. He said he did not wish for me to go down the lane; didn't wish Mrs. Donaghy to know. When I gave it into his arms he told me to kiss baby. I returned to the house. He went away. Moses was going as I came. McNicholl was out about twenty minutes. Moses was back about ten minutes after Patrick returned. McNicholl brought back the coat. He was to bring it back, and he gave it to my sister. He said Mrs. Donaghy was kissing the baby when he gave it to her on the road. He stayed till after twelve o'clock. He had tea just after he came back. I

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Cr. Ca. R. went into the lane outside the gate; walked up and down with
1917. him. At seven o'clock next morning I went down the lane to the
road where the lane joined. Looked for tracks. Saw none of
motor or car. I found the ribbon produced at the gate below
McNICHOLL. sister's house. It is like that on my child's bootee. On Monday
(this was April 30) he came at 8.30 p.m. I met him outside.
My sister wrote to him (see her evidence below as to this letter).
I was watching for him. I asked where was baby? I was
discontent (sic) about it. He said there was no cause to fret; the
baby was happy with Mrs. Donaghy; he was paying 30s. a month;
it was very cross with Mrs. Donaghy. The child was wearing a
check dress, no coat. On Tuesday I left for Oaks, on the Derry
side of Claudy. I wrote from there two or three times. I got an
answer to my last (letter 4 so received identified). He said he
would bring me in three weeks to see baby—that is three weeks
from April 27. I wrote asking him to take me to see baby.
Letter 5, I received it (identified and entered). I wrote to
Mrs. McColgan named in this letter. It was returned through
the post three or four days later. I wrote to him to come to the
Oaks. He came and told me it was adopted by Mrs. McColgan
before I wrote to her. I left for Lisnahilly, Culmore, for service.
It is down the river. I didn't let him know where I had gone.
From communication from my sister I went to Oaks to meet him.
It was Friday night the day after Donamana Fair (May 25). I
met him on the road at my mother's house, after eleven o'clock.
It was a fine evening. He came to tell me about the baby. I
said I wanted to hear about baby; I didn't want to hear anything
else before I heard about baby. He said, how could he tell me
about it, if it was dead? I said, "Surely you didn't kill my
baby." "Yes," said he, "I smothered it with the big coat in the
middle of the lane." I got weak, and went into the house. My
mother came out, and took him in. She is very old—over seventy.
I asked him what he did with the baby? He said he left it in
the lane behind a bush, carried it to Claudy, and buried it in his
mother's grave in the middle of same night, near 3 o'clock in
the morning. He said he hardly knew what he was doing. I
asked did it suffer? He said it almost died in his arms. He said
he got a spade and shovel at the parochial house (this is stated to

be six or seven miles from Mrs. Irwin's). He stayed till near 3 o'clock. Talked of baby most of the time. He asked me not to tell my sister the worst of it. I told him I didn't know what I would do. I wrote a day or two after. Can't say contents. Letter 6 received (identified and entered). Handed this letter to District Inspector Lilly, R.I.C., on June 2nd. My sister gave the other letters.

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Cross-examined.—He asked me first on the 25th what I was doing. He said he came to tell about baby. I can't recollect what he said before. I don't remember the other things he said. He came after 11 o'clock and stayed till after 3. My mother gave him tea. I was arguing about baby. I didn't kiss him when he went away. I certainly thought he killed baby. (In answer to question in this form—J.G.G.) The police came to me when I gave the letter. He was arrested on June 2. He said he put the body under or behind a bush in the lane. I could not know what to believe. The lane passes Mr. Craig's back entrance. It is fenced on both sides. On Friday, 27th, baby was dressed in chemise, roller, petticoat, check dress, with cradle blanket round it. He was back in twenty minutes—not much more. He brought my coat back. It was arranged he should do this. He hadn't more time than to get down (to road) and back. Moses was in the kitchen close by. He got up immediately and went out after prisoner left. I only went with prisoner just outside house with baby. Moses was going in the direction of the fields when I saw him, towards Mr. Craig's avenue gate. The shortest way would be by the lane. Moses was back ten minutes later than prisoner. He (McNicholl) sent money to me to Donegal. When I wrote, he would send it. I left Donegal of my own accord. I was living there with my sister Mrs. Curley. I left the baby one night with a woman in Derry. I went back with it to Skeogh, and stayed there a week or two before going to the Irwins. I went there direct, not stopping at Oaks. The defendant wanted my mother to take the child. I asked him about the baby, as I had no home for it. He asked my mother and offered to pay for it, but she said she couldn't, as she was too old. That was before he took it away. Mother came to Drumcovitt the day before 27th. He said if my

Cr. Ca. R. mother wouldn't take it, Mrs. Donaghy would. He wrote to my
1917. brother-in-law, McClosky. He asked my mother once or twice.
R. Moses objected to the baby being at Drumeovitt, and my sister
v. said she could not work with it, and was tired of it. It was the
McNICHOLL. prisoner who first proposed to take baby away. The conversation
 with my mother was after he mentioned Mrs. Donaghy. On the
 27th April, he left after 12 o'clock. He had tea; didn't ask for
 it. He said he had been up at a wake the night before and was
 tired. I wasn't twenty minutes in the lane. I fed the baby just
 before he came in. I would give it the bottle late. I gave it
 every two hours whenever it would wake. Irwin went into the
 room. He came in when we were out. (This refers to the
 searching for sticks for fire for tea.—J.G.G.) I went out and
 he (prisoner) followed me and came back for tea. We were out
 afterwards about twenty minutes. Irwin went into the room
 when we were five minutes out. He was in the room by himself.
 The ribbon was same as that on my sister's child, the youngest,
 three weeks older than mine.

Mrs. Annie Irwin examined.—Wife of Moses Irwin. He
 works for Mr. Craig. Our cottage is on the lane, off the county
 road. She came to me on March fair day, Claudy, Tuesday,
 March 20. The child was vaccinated by Dr. Thompson of
 Fincairn Dispensary District a short time after it came. After
 it was vaccinated, prisoner came at 8 o'clock at night, before
 bedtime. I said I got the baby vaccinated, Tillie told me. He
 said that was right—vaccinated as Elizabeth McNicholl, and to
 say they were married. On Friday, 27th April, the night after
 Donamana fair, he came about 10.30. My husband, myself, and
 our three children were in the kitchen in bed. The others were
 not in bed. I can't say who let him in. Tillie let him in. He
 was in the scullery. There is a door from it into the kitchen.
 Tillie told me to get up. When I got up and was dressing, he
 stayed in the scullery. Tillie lifted the baby, and gave it to me
 to dress. I put on flannelette day-dress, check, roller, chemise,
 and blanket from cradle, and bootees. They were fastened with
 ribbons like that produced. Tillie's coat was put round it. It
 was to keep baby warm till it was brought to the trap, and it
 was then to be taken back again. I gave baby to Tillie. The

prisoner was standing in the kitchen with her. He came in while the child was a-dressing. They went out. She was out two or three minutes. My husband was in bed. He got up immediately after they went out. Prisoner was back in twenty minutes, gave me the coat, and said, "I wasn't long; I left the woman smothering it with kisses." Tillie went for sticks as the fire was going out. I wanted it to make tea. He asked where she had gone. I said she had gone for twigs to light the fire. They (she and he) were out a short time—very. My husband came back just as they went out for the sticks, and went into the room. Mrs. Burke was at the fire. Tillie and he had tea; no one else. Afterwards they went out together. She was out a short time.

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On Saturday (next day) I wrote to prisoner to come and satisfy Tillie about baby, as she was fretting, and crying, and talking about baby. I asked him to come on Monday—7.30 or 8 o'clock.

On Monday he came to the house, to the slap entry into the lane. I saw him there. Tillie was with him. I went out and spoke to him. "Patrick, where is the baby?" He answered, "With Mrs. Donaghy, three miles below Dungiven. I am paying 30s. a month for it." I said some one would go to see it; whom would he prefer, my husband or Tillie? He said Tillie. On Tuesday, May 1st, she went to Oaks by the mail motor. I wrote to prisoner after May 1st. I got letter produced in reply. (Letter entered.) I asked in my letter where baby was, and to come over and tell me; that Dr. Thompson had been asking about it. Tillie was then at Oaks. I can't say how long. I wrote to him again, almost by return, after his letter. I said in my letter—"This is the last chance. If you don't write by return, and give a satisfactory reply, you will have others to deal with." I got reply. (Letter entered.) I sent the reply to Tillie, and wrote to defendant, saying I had forwarded it to her.

Cross-examined.—Dr. Thompson vaccinated the child. He (prisoner) told Tillie to tell me to have child vaccinated and registered in his name. The vaccination scab was off the arm on the 27th. It was vaccinated about a fortnight after coming to Drumeovitt. My husband was in bed when prisoner came on

Cr. Ca. R. 27th into the kitchen. He got up. I told him. He went in
 1917. direction of the avenue, by the field. There was a lamp in kitchen
 R. lighting all night. On Monday Tillie was at the slap. I never
 v. pressed him to marry her. He said it was always his intention
 McNICHOLL. to marry her.

Moses Irwin examined.—Labourer. Working for Mr. Craig, Drumevitt. On 27th I was in bed. There is a dresser in the kitchen facing the door, and the bed was behind it. I heard them talking but not what was said. My wife got up first. She spoke to me. I got up and dressed. I went down the field to the main road to Craig's avenue gate, sixteen or seventeen perches from the lane entrance to road. I went quickly. I stopped at the gate and saw and heard nothing. I saw the lights of a motor at Balagh, one mile off, coming in my direction on another road—below the road I was on. It would go that other road. I went out in five or ten minutes.

Cross-examined.—I knew from the voice who came in. I never spoke to him. I dressed. I went by avenue. Heard no noise. Night was breezy, not much. I noticed the motor five minutes after I was there. The Gallony road branches off one mile from the avenue gate. It goes to Feeny. I can't say if a motor was at end of lane whether it would have had time to get away before I reached the avenue gate. I returned the same way and went into the room. McNicholl and Tillie were then out after the sticks.

Serjeant Loughlin, R.I.C.—Large map produced. *A* is Moses Irwin's house. *B* the lane. 462 yards from house to road. *C* is avenue gate; 99 yards from the lane entrance. Distance by fields from house to avenue gate is 495 yards. You pass a wire fence a yard high. Feeny is to the left. Dungiven is to the right. *D* is on the Gallony road. It is Gallony Cross. That road runs by Fincairn to Feeny. I arrested prisoner on June 2nd at his place at Coolnaculphagh, at 7 o'clock a.m. He was in bed. His brother was with him, also a servant girl and boy. I told him to get up and dress. He did so. I arrested him, telling him he was charged with the murder of the child Elizabeth McNicholl, otherwise Burke, and gave legal caution. He said—"I don't know anything about it." On 29th May I got the letters from Mrs. Irwin—five, I

believe—received by Tillie, and on June 8th two to Mrs. Irwin, *Cr. Ca. R.*
 which she gave me. I searched since the arrest the neighbour- 1917.
 hood of Drumcovitt for body of child and found nothing. I made R.
 inquiries also as to any living child unclaimed. There was no v. **McNICHOLL.**
 such child.

Cross-examined.—My inquiries were since the prisoner was returned for trial. Prisoner lives four miles from Irwin's. From Irwin's to Claudy chapel is $5\frac{1}{2}$ miles. Feeny to Claudy $5\frac{1}{8}$ miles. Irwin's to Feeny, 1 mile by road, by short-cut passes half mile. The chapel at Claudy is in the village.

Sergeant Moroney, R.I.C.—Three years stationed at Dungiven. No Mrs. Donaghy lives within three miles. There is one Mrs. Donaghy on the Limavady Road, four miles from Dungiven, in different direction from Garvagh.

J. S. Wilson examined.—Bank Manager, Belfast Bank, 86 Talbot Street, Dublin. Resides above the Bank. House is not used as nursing home. No Mrs. McColgan is there. A letter addressed to her came early in May and I returned it.

Lilly, District Inspector, R.I.C., examined.—On June 2nd examined grave where prisoner's mother was buried; pointed out by the P.P., Father Doherty. He is middle-aged. There was no appearance of the grave having been opened for a considerable time. On June 2nd I got from Tillie herself the last letter addressed to Tillie.

Cross-examined.—The grave was not disturbed for six months.

Mrs. Donaghy examined.—Farmer's wife. Lives in Limavady Road, four miles from Dungiven. I never saw the prisoner. He gave me no child to nurse. There is a Mrs. Donaghy $1\frac{1}{2}$ miles from Limavady. She is no relative.

The Crown case closed. *Mr. Henry K.C.* stated he did not propose to call evidence.

The various letters to Tillie Burke and Annie Irwin were duly entered in the course of these respective examinations. They were all in pencil, in clear hand-writing, though in a few unimportant places they were somewhat blurred from handling. There were no dates on any, and the time can only be approximately fixed. The date of the last letter to Tillie Burke, in some respects perhaps the most important, was after May 25th and before June 2nd

Cr. Ca. R. when the arrest took place. It was probably before May 29th.
 1917. The three first letters were received at Drumeovitt while Tillie
R. Burke was there and preceded April 27th. Those to Oaks were
v. after May 1st. The letters to the prisoner were probably not kept
 McNICHOLL. by him and secondary evidence of their contents was received,
 without objection, notice to produce having been given.

The credit of the witnesses was not impeached, though their accuracy was questioned, particularly in case of Tillie Burke, who did not seem as capable and intelligent as her sister. All the witnesses seemed to me truthful.

The order of events on April 27 was, as I understood, as follows:—McNicholl entered the scullery, the entrance to the cottage, and remained there while Mrs. Irwin, who had been in bed, was dressing. When she had dressed baby, Tillie took it, and carrying it outside handed it to the prisoner with whom she remained for a short time, and then returned indoors. The prisoner having got the child was away some twenty minutes when he re-appeared, carrying the yellow coat which it had been arranged he was to bring back. On McNicholl leaving the house, Moses Irwin got up. Having dressed himself he went down the fields to the avenue gate to observe and watch. Before he came back, Tillie Burke went out for sticks to make up the fire for tea, and McNicholl on his return followed her out and stayed with her for a short time. Meanwhile Moses Irwin came back and went into the room, where he would not be seen by the prisoner, McNicholl. Tillie Irwin having come back they had tea together, and the prisoner stayed about the place till 12 o'clock, having spent some time walking up and down outside with Tillie Burke.

The court having adjourned to 10.30 o'clock a.m. on the 19th, and the jury having been meantime locked up, *Mr. Henry* at the sitting of the Court asked me to direct an acquittal on the ground that there was no sufficient evidence of the death of Elizabeth McNicholl, and that the confession of the prisoner was not sufficient proof. He referred to *Reg. v. Sullivan* (1) for the statement of law by Palles C.B., and *R. v. Hopkins* (2). In the former case

(1) 20 L. R. Ir., at p. 570.

(2) 8 C. & P. 591.

there was no evidence of the unlawful character of the meeting save what the defendant's newspaper supplied.

Mr. Wylie K.C., for the Crown, referred to Archbold, Criminal Law, last ed., pp. 873, 874; see also p. 401, and contended that, taking the evidence as a whole, letters, conduct, and confession together, there was an overwhelmingly clear case that the baby had ceased to live, and had been killed by the prisoner. He argued that the rule as to production of the corpus delicti was a rule of judicial prudence or caution, and was not inflexible and universal, and that the facts in evidence supplied the necessary proof on which a conviction could be founded.

No other authorities were cited, and having regard to the gravity of the case, the novelty of the point in Ireland, where apparently the question has not arisen for decision, and the importance of the question as affecting judicial procedure, I thought it right at *Mr. Henry's* instance to reserve a case, if there was jurisdiction to do so, when the authorities could be considered as to the exact nature of the rule or principle of law or evidence, the circumstances affecting its application, and the bearing of the rules on the evidence in this case.

I declined to accede to *Mr. Henry's* requisition to withdraw the case from the jury. The points on which the Crown relied as conclusively establishing that the child was dead, and had been murdered by the prisoner were, as I collected, as follows:—

The prisoner had formed a plan long beforehand to get possession of the child, and succeeded in doing so by fraudulent misrepresentations, which indicated criminal design. His subsequent falsehoods showed that his design had been carried out. The baby was made away with during the twenty minutes when he was absent on the pretence of giving it to *Mrs. Donaghy*. Had it been left alive in the lane, it might have cried and provoked attention while the prisoner was away till 12 o'clock. He had abundant time to carry off and dispose the body after he left *Drumcovitt*, whether the place of concealment or destruction was one in *Drumcovitt*, or his own place (which was not searched) or elsewhere. The baby was incapable of will or locomotion, and the prisoner entrusted with it was not at all in the same position as if he had been with an adult companion who had inexplicably

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Cr. Ca. R. disappeared, or as if his possession of the child had been in origin innocent. The confession of the prisoner fitted into and supplied the only rational explanation of the facts. It was corroborated by his conduct, and the letters, particularly the last, that written after May 25th. All the false statements of the prisoner as to Mrs. Donaghy and Mrs. McColgan were in his own supposed interest; and the falsehood as to the place of burial being in his mother's grave may have been intended to touch, soften, and appease Tillie Burke with the thought that her child was in consecrated ground and in the family grave. The only statement adverse to the prisoner was as to the smothering of the babe, which the jury, looking at his conduct as corroborating it, were at liberty (unless a rule of law prohibits) to give weight to, though everything else he said was invention.

In allowing the case to proceed, I gave no reasons, as the jury was to deal with the case, but the considerations above suggested seemed to me exceptionally strong, unless the absence of the body was decisive against conviction.

Mr. Henry then addressed the jury. He referred to defendant having admitted paternity, sending money to Tillie Burke. The child was vaccinated and registered in his name. His relations to her must have been well known to all in the neighbourhood of Drumeovitt. He sought to get Mrs. Burke to take the child. The conduct of Tillie Burke on May 25th was inexplicable if she believed what she alleges he said. The manœuvres of Moses Irwin on the 27th cannot be accounted for. He refers to letters 1 and 5; the latter he describes as half-mad. No reliance can be placed on anything McNicholl said. The child was not buried at Claudy. For all we know, the child may be alive, or may have died naturally—perhaps accidentally smothered. How did it die, if it be dead? McNicholl's conduct on 27th, returning for tea and talking for an hour, makes it incredible that he could have committed the crime.

Mr. Wylie K.C., in reply, relied on the combined force of letters, conduct, and confession—particularly on the last letter as showing that the confession was not a casual, irresponsible utterance. I should add that as to the conduct of Moses Irwin

mentioned by *Mr. Henry*, no question was addressed as to his motive, whether unwillingness to have personal relations with his sister-in-law's seducer or otherwise, and his movements outside the house might be regarded as proceeding from a desire, without meeting the prisoner, to be satisfied that the child was safely in Mrs. Donaghy's custody, or from some suspicion. I charged, summarizing the evidence and the points on both sides. There was no objection to my charge on either fact or law, nor was I asked to supplement it in any way.

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The jury convicted the accused, and I sentenced him to be executed on the Tuesday fortnight next after the judgment of the Court for Crown Cases Reserved on this case reserved, if the decision was against him.

The questions for the determination of the Court are:—
(1) Was there evidence on which the prisoner could be properly convicted? (2) Could the case have been properly withdrawn from the jury? (3) Should the conviction be quashed and the judgment reversed, or should the same be affirmed?

J. G. GIBSON.

APPENDIX.

LETTER No. 1.

My Dear Tillie,

Since I was talking to you I have decided to take charge of the child. I know a woman will take it for me and look after it and I will pay her well. I have written her and stated it was a friend's of mine. No one will ever know whose it is. If you agree I will take a motor and take it away. She will come with me in the dead of night and you can say a woman took it to nurse it.

The idea of a secret marriage is not good enough for you or me. I could not stop at home an hour and I am ill able to go away and make a home at present. I honestly mean to have you when I have a decent place to take you and when we can go out and marry before the world. I have spent a good deal on my poor wee baby, I like it, and I'll spend more on it. I'll take all charge of it now. You will be free and no one can tell you to take it away. Let me know when I shall go for it. I will have a letter on Monday from my friend and I will take it down to the road myself. She will not know anything, nor see you. I am honourable and will be. I wish I had done this long ago. Your sister need not write the Priest now. You can tell Annie this.

Ever the same to you,

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I love you and I'll ———— and my own and when I get some ————
I'll take the wee baby. I won't take any other. I hope you will be content
now. I am doing a lot. I don't care. I'll do anything to make you happy.

Good-bye, Tillie,

Ever yours, P.

XXXXXXXXXXXXX

Write soon.

LETTER No. 2.

My Dear Tillie,

I had a letter from that woman this morning. I went to Claudy to meet the post. She says she will take my wee baby and be glad of it. I told her it was mine, but told her about nobody else.

She is my own cousin and will keep it as her own. She is married and has one child. Her husband is dead and she has a comfortable home and cows of her own. I wish I had written to her before, but I did not like to tell her. She will never tell where she got it. She will come any night I go for her and will stop till I bring it down to her. I did not tell her where it was, nor won't. I want to see you sure on Tuesday night at half-past eight. You might meet me out at the lane at that time. I want to tell you all and I don't want to go in, so meet me on Tuesday night sure. Good-bye, Tillie.

Same as ever, P. XXXXX.

LETTER No. 3.

Don't write too often for a while. You understand.

My Dear Tillie,

A wee note to say that I got home all right that night. I was white with snow and I am feeling a sort of ill since. I got heated and my feet wet going and everything together my legs is threatened with the pains. I bandaged them. I don't know yet whether I will be all right or not. I will go to Derry to-morrow if I can. The Priest is very odd and my own Priest is worse, but after I get some money made, and I'll get whatever is coming to me, I'll get a house and start live. You won't say I am bad any more. We arranged to wait and that will stand, for if I went now I must go in want. I could not do that. You can show your rings and say you are married and nobody will know but you are. This is the best way you will see when you look through it, and I will give you some money after I can, but I am bare now. You gave it to me that night. I was not to blame, and you said in the house before them all it was all my fault, but you know it is not. I never blamed you, but you always said it was you done it, but all is forgot now and we are friends until I am ready. Good-bye.

Yours true, P.

XXXXXXXXXXXXX

LETTER No. 4.

My Dear Tillie,

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Your letter received. I am sorry that you are so annoyed ——— and you can surely stop fretting to that; it is doing well and happy so there is no cause for you to fret. You say your mother would take it. Well, she was well enough tried and Annie was tried. I offered to pay anybody for keeping, but no, and then I had to get it a home somewhere, and I got it in my charge. You gave it up altogether and now it seems I am to be troubled more than I was when it was in Feeny. I am not happy more than you; everybody knows now and my days here are short, and when I go it will be to the grave, no more bother with me, so now content yourself until Sunday fortnight; that was a bargain, and don't be fretting for the baby is well and happy, and then you will know all about it.

Same as ever,

P.

LETTER No. 5.

Write to me, and don't be too hard on me. I went to the bad and I am sorry now.

Forgive me.

My Dear Tillie,

Your letter received to-day, and if I took no notice of your last nor went down it was because I could not face you, for I know I have went wrong and can not keep from killing myself much longer. I am sorry for you now and hate myself, and when you say you will put higher powers at me it is only the hand of better than me that saved me from death. I hate to tell you about the wee baby. I ask you not to be too hard on me. I want to confess all to you, it will ease my wicked mind, and Tillie for all sakes don't bring me into the law for I will poison myself before I will answer anything. Well, forgive me for this, the baby is in Dublin adopted with a lady. I saw the thing in the paper and I wrote to her. I did not know what to do. I wanted it happy and I wanted you free, and you told me you would give it to me. The other woman kept it until a nurse came for it. I know I done wrong, but I am nearly mad now, but it is in a lady's house and will be kept as a lady. She is a Mrs. McColgan, 86 Talbot Street, Dublin. I would like you would tell me where you be. I want to see you again. Now, Tillie, let me live a wee while for God sake to repent of all my wicked life. God forgive me for all I have done.

Your unhappy P.

Now, Tillie, I am making a straight and frank confession to you of all my wrongdoing and I can't help doing it, but this was not done for badness. I know I am bad and wicked. I will suffer for it all. I talked about getting it adopted to you before ever you went away. I did not think you would fret so much, but if I had not took it you were left in bother. I done it for the best, and if it was wrong I did not mean it. I might have been good

Cr. Ca. R. once and I humbly ask you to forgive me for all my badness. I am miserable now. I am not the smart big man no more. I am down to stay, the people in Claudy and everywhere is on to me and I don't know what to do.
 1917.
R If you think of going to the authoritys let me know so that I will get even
v. five minutes to pray for I will be plunged into hell, for you know I cannot
 McNICHOLL. stand it if I would be arrested. I am mad and Johny in such a hubble and no girl in the house after Wednesday. Now, Tillie, this is all the truth. I am at your mercy now. I leave myself in your hands, and if I must die I will go to some place to kill myself where I won't be got for a long time. Don't tell that you know what happened, let them look for me. Write to me again and good-bye. I will live till I hear from you. I don't ask you to save me, but say a prayer for me when I am gone. What good is in life any more? I wish I had known the end of this; I would have watched better. I never meant you harm, but God forgive me for the past and what is to come. I am not telling you this to frighten you. You can save my life or take it now. I have the bottle in my pocket now, and will not touch it to I must. I told you the truth; I hate to tell you; but I cannot keep it any longer.

LETTER No. 6.

My poor Tillie,

How will I write to you. I got your letter and I am just waiting until Annie hears it and sends the police for me. Oh, Tillie, dear, forgive me if you can, I am going out of my mind. I don't know what to do or where to go. I doubt I'll do something wrong before I get settled. I never sleep, nor I can look at nobody. Oh, if I am handed up what will happen. I'll die and you poor wee Tillie that was so good to me I am praying for you to get some peace of mind; for me there is no hope in this world; I'll never have a happy hour. I don't deserve. I did not mean to ever be so bad, but my mind must have been away. I can mind very little about it that is so odd and that is true; how could I tell you the truth, and don't blame me If I told you lies. I could not tell you, poor Tillie, may God comfort you now. Could you look in my face? I am a beast of the worst kind. You are good and will get to heaven, but me, Tillie, never. Oh, try and save me if you can and let me know if they are going to take me and let me go in time to death or something. God bless you.

My poor wee girl.

God comfort you.

I am going to Dunamanagh to-morrow to get away from home. Pray for me. God bless you; you are good.

I can't live until I hear what Annie says. Oh, God send her to not ruin me; I want to die, but not in that way. You know, Tillie, they will want to get at me. Give me a chance. God comfort you and your poor Mother. She is good. I wish I saw you again.

Your broken

P.

LETTER No. 1 TO MRS. IRWIN.

Cool, Claudy.

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Dear Mrs. Irwin,

Your letter received to-day, and I am sorry I could not get over owing to us being away late working.

You can tell Dr. Thompson that the baby is in Dublin adopted with a lady there. I told Tillie all about this, and therefore there is no more mystery about it only I would request that no one should know that I was the one got the baby out to nurse. I took it and Tillie nor none of you knew, and I am the one that is responsible for all. You can tell Dr. Thompson this and ask him respectfully to not tell this on me. You can give him this letter to read.

Sincerely yours,

P. McNICHOLL.

IN REPLY TO LETTER FROM MRS. IRWIN.

Dear Mrs. Irwin,

If you would let me know where Tillie is I will go and tell her everything. She asked me to go to the Oaks on Thursday night, but we had no girl and I could not get out. I was going on Saturday night, but she wrote and said she was away. It was not badness of me, but we were in a huddle in the house. Give me this chance if you can. I won't ask any more.

Yours sincerely,

P.

If you can't stand me any longer surely you will write and tell me where Tillie is, for I am fretting about her. If you don't want to write to me tell Tillie to write to me; but I ask this chance for the last.

Denis Henry K.C. (with him *Babington*), for the accused:—

We contend that there was no proof of the corpus delicti, either by the finding of the body of the child or by proving that it was murdered. Confession is not sufficient. We rely upon Sir Matthew Hale's statement of the law (1), referred to by Palles C.B., in *The Queen v. Sullivan* (2), at p. 567, as "the celebrated statement of Lord Hale, which is always cited in cases of this description." Sir Matthew Hale says (1): "I would never convict any person for stealing the goods ejusdam ignoti merely because he would not give an account how he came by them, unless there were due proof made that a felony was committed of these goods. I would never convict any person of murder or manslaughter, unless the fact were proved to be done, or at least the body found

(1) Pleas of the Crown, 1778 ed.,
vol. ii, p. 290.

(2) 20 L. R. Ir. 550.

Cr. Ca. R. dead." Palles C.B., referring to this statement in *The Queen v. Sullivan* (1), at p. 567, says: "Each of these two sentences must be taken separately. Neither of them has, in terms, any reference to a confession. The case of larceny that he deals with is one in which the owner is unknown, in which there has not been a confession, and in which the only evidence against the prisoner is his not giving an account of how he came by the goods. Unquestionably, in such a case, a jury would now be directed to acquit in a prosecution for larceny; but the sentence is no authority for the proposition that in such a case of larceny, a confession, although extra-judicial, would be insufficient to warrant a conviction without independent proof of the commission of the felony. The subsequent authorities make it clear that in such a case independent evidence is not necessary." Palles C.B. then referred to the authorities, especially *Rex v. Falkner and Bond* (2).

We emphasize the distinction between cases of homicide and larceny. In *Regina v. Burton* (3), Maule J. said that the rule that the corpus delicti must be expressly proved was laid down by Sir Matthew Hale "only as a caution in cases of murder. He does not say it is to be observed in every case." [Campbell C.J.: He was referring to the rule as a caution to be given by the presiding judge to the jury.] Sir Matthew Hale said that he acted on the rule of not convicting unless the fact of murder was proved to be done, or at least the body found dead, on account of the unjust results of two cases, one the *Warwickshire Case* (4), and the other a case which occurred in Staffordshire within his own remembrance. [Campbell C.J.: Have you found any case in which it has been held that the judge could not let the case go to the jury, even although the prisoner had confessed?] In *The Queen v. Unkles* (5), Fitzgerald J., referring to Sir Matthew Hale's rule, said: "This rule seems to have had its origin in cases where the charge of murder depended on the fact of the disappearance of the party alleged to have been murdered. . . . It would perhaps be at present more correct to define it thus, that a party accused of homicide ought not to be convicted on his own confession merely,

(1) 20 L. R. Ir. 550.

(2) Russell & Ryan, 481.

(3) Dears. C. C. 282, at p. 284.

(4) Coke's Institutes, Pt. iii, p. †231.

(5) I. R. 8 C. L. 50, at p. 58.

without proof of the finding of the dead body, or evidence aliunde that the party alleged to have been murdered is in fact dead." *Cr. Ca. R.* 1917.

[Kenny J.—At p. 57, FitzGerald J., said: "It is clear law that the accused may be convicted even in capital cases on his own statement, if satisfactorily proved." Yes, if the fact of murder is satisfactorily proved aliunde. [Campbell C.J.: Is not the real decision in *Rex v. Lambe* (1), which was the unanimous decision of the twelve judges, that the confession of the accused is the highest form of evidence?] The learned author of Greenleaf's Law of Evidence, the American authority, says at p. 301 of the 11th ed., that in each of the English cases usually cited in favour of the sufficiency as evidence of the voluntary confession of the accused there was some corroborating circumstance. See, too, Wills on Circumstantial Evidence, 6th ed., p. 373. In the present case there is no evidence corroborative of the fact of death. [Campbell C.J.: The only question in *The Queen v. Sullivan* (2) was whether the confession was admissible in evidence against the accused. The case was not one of homicide, and the point did not arise for decision.] Palles C.B. said at p. 570, that it is the settled practice that in no such case ought a confession to be acted upon without evidence of the corpus delicti. See Russell on Crimes and Misdemeanours, 7th ed., p. 2156, note (d). [Campbell C.J.: In *The King v. Hindmarsh* (3) there was no direct evidence of any blow, and the body was never found, yet the judges unanimously approved of the conviction.] That was a strong case of circumstantial evidence. Suppose a case in which a decomposed naked body is found which could not be identified. [Campbell C.J.: If it is necessary that the body of the alleged deceased must be found, then an unidentified body is not sufficient.] In *Regina v. Hannah Hopkins* (4) a girl was indicted for the murder of her infant. She was seen near a river with the child in her arms about 6 p.m. She arrived at her home about 8 p.m. without the child. It was held that she must be acquitted, and that she could not by law either be called upon to account for her child or to say where it was, unless there was evidence to show that her child was actually

(1) 2 Leach, Cases in Crown Law, 552.

(2) 20 L. R. Ir. 550.

(3) 2 Leach, Cases in Crown Law, 569.

(4) 8 C. & P. 591.

Or. Ca. R. dead. [Dodd J.: Suppose that the accused has pleaded guilty although the body is not found?] That brings in the question of judicial and extra-judicial confessions. In *The King v. Lambe* (1) 1917. R. v. Grose J., in delivering the opinion of the judges, in a passage cited by Palles C.B., in *The King v. Sullivan* (2), said, at p. 554: "Confessions of guilt made by a prisoner to any person at any moment of time . . . are at common law admissible in evidence as the highest and most satisfactory proof of guilt, because it is fairly presumed that no man would make such a confession against himself, if the facts confessed were not true." [Campbell C.J.: Palles C.B. emphasizes the fact that *Lambe's Case* (1) is of universal application and without exception. In Chitty's Criminal Law (3) the author says: "It is said to be a good general rule, that no man should be found guilty of murder, unless the body of the deceased is found. . . . But this rule must be taken rather as a caution [to the jury] than as a maxim to be universally observed."] *Lambe's Case* (1) was a case of burglary, and the factum of burglary was proved aliunde, and no question of this kind arose, and the dictum of Sir Matthew Hale was not referred to. [Campbell C.J.: Do you put forward the dictum of Palles C.B., in *The Queen v. Sullivan* (4), as applying not only to a case where you have a bald confession, but also to a case where the other facts do not per se amount to proof of murder?] I do. Where the corpus delicti is established by a confession only and the body is not found, the case should not go to the jury. [Campbell C.J.: In a case where the body was not found, and the circumstances do not per se amount to proof of murder?] Yes. The dictum of Palles C.B. covers that case. [Campbell C.J.: Test that view by *Hindmarsh's Case* (5): Do you say that in that case, unless the external circumstances were sufficient per se to establish the corpus delicti, a confession by the accused would not have been enough?] In *Hindmarsh's Case* (5) there were external circumstances which amounted to proof of murder. Here they are absent. There is nothing but the bare confession.

(1) 2 Leach, Cases in Crown Law, 552.

(2) 20 L. R. Ir., at p. 565.

(3) 2nd ed., vol. iii, 738.

(4) 20 L. R. Ir. 550.

(5) 2 Leach, Cases in Crown Law, 569.

There is no corroboration of the confession. The facts proved are quite consistent with many things other than murder. The accused may have handed the child to some third person in the lane. *Cr. Ca. R.*
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[Campbell C.J. : Must you not push your argument to this, that these outside circumstances are to be excluded unless per se they establish the corpus delicti?] Yes, you must establish the corpus delicti by finding the body, or by proof of the act done.

[Campbell C.J. : You put your proposition in this way—"Putting aside the confession, do the facts proved amount to proof of murder?"] I do. Suppose there was no confession, have you proof of the corpus delicti without it? Suppose there had been no confession, and the only evidence was that the child had been handed over to the father, who goes out and comes back without it. In *Regina v. Hannah Hopkins* (1) Lord Abinger C.B. said :—"With respect to the child which really was the child of the prisoner, she cannot, by law, be called upon either to account for it, or to say where it is, unless there be evidence to show that her child is actually dead." What Sir Matthew Hale meant was that there must be actual proof of the killing. Here there is no proof whatever of the factum of killing; there is no evidence that the child is dead. [Campbell C.J. : Have you any case, in which a man had taken over the custody of an infant child, to show that he cannot be called upon and is not bound to account for it?] I have not. I rely upon the general principle of law. The prisoner cannot give evidence. The confession here is shown to be a lie in several respects. [Campbell C.J. : You say that nothing can help the confession which in the absence of the corpus delicti would not of itself amount to proof of murder?] Yes. In *The Queen v. Unkles* (2), FitzGerald J., at p. 58, put the rule thus :—"A party accused of homicide ought not to be convicted on his own confession merely, without proof of the finding of the dead body, or evidence aliunde that the party alleged to have been murdered is in fact dead." In *Hindmarsh's Case* (3), although the body was not found, there was proof of the act done sufficient to go to the jury. In this case you cannot get to the second limb of Sir Matthew Hale's alternative without assuming that the confession is

(1) 8 C & P., at p. 592.

(2) 1st R. 8 C. L. 50.

(3) 2 Leach, Cases in Crown Law, 569.

Cr. Ca. R. true. You cannot add together two things which would not
 1917. amount to proof in the absence of the corpus delicti, and then say
R. that you have got proof. You cannot link a defective confession
v. to defective evidence. [Gordon J.: Is it not open to the jury to
 McNICHOLL. consider whether the statements in the confession are true?] The
 falsity of some particulars in the confession are an argument to show
 why Sir Matthew Hale's rule grew up. [They also cited Black-
 stone's Commentaries, 1857 ed., vol. iv, p. 420; *R. v. Edgar* (1).]

*The Attorney-General (James O'Connor K.C.) (with him
 Wylie K.C. and T. Henry Maxwell):—*

The only question the Court has to consider is as to whether
 there was evidence fit to be submitted to the jury.

There is no distinction in principle between the laws of
 evidence in homicide and in any other case. Further, in a case
 of homicide, there is no distinction in principle between proof of
 the commission of the crime and proof of the connexion of the
 accused with the crime. The rule in all cases is that the evidence
 must be of a substantial character to go to the jury, and that
 rule applies whether the factum probandum is the commission of
 the crime or the accused's connexion with the crime.

To understand the limits of the suggested rule as to the weight
 to be attributed to confessions, regard must be had to the reasons
 for the rule. It is a curious paradox that a confession is at the
 same time the highest class of proof, and yet the proof most sub-
 ject to suspicion; and the very attributes that make a confession
 the highest form of proof also make it subject to suspicion. It
 is the highest form of proof because a confession is contrary to
 the interests of the accused, and, therefore, great weight must be
 attached to it: *Taylor on Evidence*, 10th ed., par. 865. It is open
 to suspicion because it is contrary to the accused's interests, and,
 therefore, gives rise to the suspicion that it is the outcome of a
 morbid desire for publicity, or of self-deception: *Taylor*, par. 863.
 It follows from this that the rule that confessions must be
 regarded with suspicion applies to all cases, and not merely to
 cases of homicide, although, of course, the greater the gravity of

(1) *Russell on Crimes*, 7 ed., p. 2156, note (d).

the offence, and the greater the punishment, the more caution should be exercised with regard to a confession. Cr. Ca. R.
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But if the jury is satisfied affirmatively, on the whole case, that the confession is the emanation of a sane mind, acting from a desire to tell the truth, the jury can act upon the confession, whether the confession be of the accused's connexion with a proved crime, or with a crime not otherwise proved. If the jury is satisfied of the sanity of the accused when he made the confession, and that he was desirous of telling the truth when he made it, then the confession is of the highest possible efficacy, and should be regarded as upon as high a plane as a judicial confession. There is no essential difference between a judicial and an extra-judicial confession. The former, however, has the weight of being made with solemnity, and under the protection of a judge, and is, therefore, conclusive. R.
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In dealing with the circumstances of the confession, the jury in forming an opinion upon it may take into account—(a) the antecedents of the accused, (b) the motive for the crime with which he charges himself, (c) the proof of circumstances which tend to show whether it is true or not, and (d) the quality of the confession itself; e.g., whether it was made merely casually, or with some degree of solemnity, or repeated more than once. It is idle to suggest, where circumstances are proved which indicate a probability of a confession being true, but which at the same time *per se* fall short of actual proof of its truth, that the jury cannot act on the confession. Thus, for example, if two men were seen entering a place in which there was a furnace, and one man only emerged from the place, and admitted that, from a proved motive, he had cast his comrade into the furnace, surely that would be evidence to go to a jury, even though the body was entirely consumed; and yet proof in this illustration does not exhaust the possibilities, for, non constat, the accused's comrade might have committed suicide by casting himself into the furnace. These illustrations might be multiplied; e.g., two men are seen going up to a cliff; one man only returns, and he confesses to having thrown his comrade over the cliff, but the body cannot be found. Or, again, two men approach a crevasse; one man only returns, and he admits that he threw his comrade

Cr. Ca. R. down the crevasse. Or, again, two men go up in an aeroplane;
 1917. one returns, and confesses that he threw his comrade into the
R. North Sea.

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 McNICHOLL. The notion that the dead body must be found is entirely
 erroneous. Very many cases can be imagined in which the
 body could not be found. For instance, one man throws another
 into a rapidly flowing river, and no trace of the man thrown
 in is ever found. A jury might very well infer from such facts
 that murder had been committed even though the body was never
 found.

It is not necessary to argue that a confession *per se* is enough
 to sustain a conviction. For the reasons already suggested such
 a confession should be received with suspicion, and unless the
 circumstances fit in with it, it would probably not be sufficient;
 but we say that when there is a confession, and concurrent
 circumstances tending to show its probability, that that constitutes
 a case to go to a jury.

The argument upon the other side is this: that because a con-
 fession *per se* cannot convict, and because the other circumstances
 in proof are not by themselves sufficient proof of the crime,
 therefore, there can be no conviction. But this is a fallacy, and
 entirely ignores the principle of cumulative proof. Circumstantial
 evidence always consists of cumulative proof, and a conclusion
 based upon it is a conclusion based upon the sum of the proba-
 bilities in the case. In a case proved by circumstantial evidence,
 no one or two circumstances indicating the probability of the crime
 may be sufficient; but if there is a large number of circumstances
 indicating such probability, they may amount to proof.

In this case there was tremendous additional proof against
 the accused besides his confession. His criminal design was shown
 by his frequent attempts to get possession of the child. He took
 the child away at night. He did not put it in a trap or motor-car
 as he alleged, because there was the track neither of a trap nor
 of a motor-car at the end of the lane. He subsequently told lies
 about the whereabouts of the child. He took the child out
 wrapped up in a coat, and he brought back the coat in twenty
 minutes. All these circumstances strongly suggest foul play, and,
 coupled with the confession, are quite sufficient to convict the

prisoner. The fact that in his confession he told some lies is merely a matter to go to the weight of the confession, and is, therefore, entirely for the jury.

What a jury should do in all such cases is to ask themselves are there circumstances dehors the confession which indicate that it is probably true, and if they are of opinion that the confession is probably true, they are entitled to act upon it whether the fact to be proved is the prisoner's connexion with the crime or the commission of the crime. A confession which the jury believe to be the emanation of a sane mind anxious to tell the truth can be acted on in respect of all matters confessed.

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Babington, in reply :—

In *Lambe's Case* (1) the evidence established the corpus delicti quite clearly. If it had not been proved aliunde that the spoons had been stolen the confession would not have been enough to support a conviction. The fact of the crime was clearly proved. [Campbell C. J.: The Chief Baron said of that case that the confession was sufficient, and that was a case in which at that time the penalty was death.] In *The Queen v. Unkles* (2) the statement made by the accused, whether it were true or false, was a violation of the secrecy of the ballot, and in itself constituted the offence. In *The Queen v. Sullivan* (3) it was unnecessary for the Chief Baron to decide that a confession was good in all cases except homicide. In that case the offence was the publication of the proceedings of the Irish National League with a view to promoting the objects of the association which, as the Attorney-General argued, in itself constituted a crime, and was of a different nature from a confession. [Campbell C. J.: You mistake what the corpus delicti is. The corpus delicti means the essential facts which constitute the crime.] The confession is evidence against the prisoner, but the Crown must prove the corpus delicti. The Judge must tell the jury that unless the other facts, apart from the evidence with reference to the prisoner's confession, satisfy them of the corpus delicti they must acquit him. Taylor on Evidence, 10th ed., p. 609, distinguishes between judicial and

(1) 2 Leach, Cases in Crown Law,
552.

(2) I. R. 8 C. L. 50.

(3) 20 L. R. Ir. 550.

Cr. Ca. R. extra-judicial confessions. An extra-judicial confession may be
 1917. — made for many reasons. In the present case the prisoner
R. may have been unable to produce the body, and may have
v. wished to put the mother off by a false confession. In a
 McNICHOLL. judicial confession the accused has before his mind the crime with
 which he is charged, and the result of his confession. In *Lambe's*
Case (1) the Court was not dealing with the question in the form
 in which it arises in this case. They were really dealing with a
 question of evidence. Even if a confession is sufficient without
 further proof of the corpus delicti in cases other than murder, we
 submit that ever since that decision cases of homicide have been
 regarded as an exception.

Cur. adv. vult.

The judgment of the Court was delivered by SIR JAMES CAMPBELL C.J. :—

The most material of the three questions submitted by Gibson J. for the determination of this Court is the first: "Was there evidence on which the prisoner could be properly convicted?" inasmuch as the answer to it must necessarily determine the answers to the two that remain. The accused was indicted for the wilful murder of Elizabeth McNicholl, his illegitimate infant daughter, and the facts in evidence will be found fully set out in the case as stated by Gibson J. No evidence was produced upon his behalf; but at the close of the case for the Crown, Mr. Henry K.C., who was counsel for the accused, asked the presiding judge to direct an acquittal upon the ground that there was no sufficient evidence of the death of Elizabeth McNicholl, and that the confession of the prisoner was not sufficient proof. It has not been—nor, in my opinion, could it possibly be—argued that assuming proof had been given of the finding of a dead body, and the identification of the body as that of Elizabeth McNicholl, the case should have been withdrawn from the jury, as upon that assumption the case against the accused would have been of an overwhelming character; so that in effect the several questions for decision narrow down to the one point,

(1) 2 Leach, Cases in Crown Law, 552.

namely, whether, in the absence of any proof of the finding of the dead body of the alleged murdered infant, the confession of the accused that he had murdered it was such proof, under the circumstances of this case, of the corpus delicti as disentitled the accused to a direction of acquittal. If evidence of the finding of the dead body was essential as proof of the corpus delicti, then the conviction in this case cannot stand; otherwise we cannot interfere with the finding of the jury, and must decline to consider the weight or value of the other evidence, as we are not sitting as a Court of Appeal; and more especially as we are satisfied that if we are against Mr. Henry's contention, there was in all other respects ample evidence to justify the conviction. By the expression, proof of the corpus delicti, is meant in a charge of murder, as I understand it, first, proof that the factum of murder took place; and, second, that the accused committed it or took part in its commission. But it seems to be quite certain that the loose language of some of the earlier text-writers on the Laws of Evidence lends authority to the proposition that the corpus delicti in a charge of murder cannot be established without proof of the finding of the dead body of the person in respect of whom the charge is brought; and the foundation for this proposition seems, so far as I have been able to trace it, to be based upon the following statement, to be found in Sir Matthew Hale's Pleas of the Crown, 1778 ed., vol. ii, p. 290:—"I would never convict any person of murder or manslaughter unless the fact were proved to be done, or at least the body found dead." I should like to point out at once that these words, upon their ordinary grammatical construction, must be read as disjunctive, and when so read do not imply more than that, in order to convict an accused person upon a charge of murder, there must be proof either of the fact of the murder or of the finding of the dead body, and fall entirely short of the wholesale proposition that in no case ought there to be a conviction for murder unless there is proof of the finding of the body. If, however, upon any reasonable construction of these words they can be read as laying down such a general proposition, and if I found that throughout the centuries which have elapsed since they were written, they have been judicially so construed, I should have felt it to be my duty loyally

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and implicitly to give effect to it in the present case, notwithstanding my own clear opinion that the adoption of such a proposition as an inflexible principle of our criminal law, would be fraught with incalculable peril to the safety and lives of His Majesty's subjects. When I reflect upon the facility with which a murderer could in these days effectively transport the body of his victim by motor to distant places, and then dispose of it by any one of the many methods of cremation or by burial at sea, or other method of destruction or concealment, I am alarmed at the prospect of impunity which in such cases must be afforded by the universal application of any such principle; and I am therefore glad that, for reasons which at least are entirely satisfactory and convincing to each member of the Court, we have been able to arrive at the clear conclusion that what has been relied upon as an inflexible legal maxim is nothing more or less than a wise and necessary caution to be addressed by the presiding judge to the jury before they convict, and differs only in its added gravity from the familiar judicial caution to juries when called upon to act upon the uncorroborated testimony of an accomplice. Upon a closer analysis it will be found that the proposition contended for would produce results reaching much further than those I have already indicated, because it involves not only the necessity for proof of the finding of a dead body, but also of proof that the body so found is that of the particular individual, and consequently it must extend to cases in which a body has been found, but which either as the result of decomposition or intentional or accidental disfigurement is incapable of clear identification, and thereby the field for the commission of this most abominable crime with comparative freedom from detection or conviction must be materially enlarged.

It is, therefore, not a matter for surprise that the authorities, so far as our investigation of them has proceeded, with the important exceptions of *The Queen v. Unkles* (1) and *The Queen v. Sullivan* (2), with which I shall deal later on, lend no support to the application of any such general principle, and certainly none where the facts of the case are such as those in the case which is

(1) 1 I. R. 8 C. L. 50.

(2) 20 L. R. Ir. 550.

now before this Court. In the case of *The King v. Hindmarsh* (1) *Cr. Ca. R.*
the accused was on board a ship, and one of the crew being *1917.*
aroused by a violent noise at dead of night, came from his *R.*
hammock, and as he reached the deck saw the accused seize *v.*
the captain and throw him into the sea. The body was never *McNICHOLL.*
recovered, but close to the spot at which the victim was seized *Sir James*
a billet of wood was found, and this particular portion of the *Campbell C.J.*
deck and the clothes of the accused were stained with blood.
The case was heard by Mr. Justice Ashhurst, Baron Hotham,
Sir James Marriott, and several Doctors of Civil Law, and counsel
for the accused relied upon Sir Matthew Hale's proposition, and
asked for a direction of acquittal. The Court admitted the pro-
position as a general rule of law; but Ashhurst J. directed the jury
that it was open to them upon this evidence to find that the
accused had killed the captain before he flung his body into the
sea. The jury having found the accused guilty, the case was
afterwards referred to all the judges, who unanimously approved
of the conviction. It should be noted that in this case not only
was the dead body never found, but also, in its absence, no proof
was possible of the nature or extent of the injuries. Several other
cases are reported in which the murder took place upon the open seas
and the body was thrown into the water, but in which, upon the
circumstantial evidence in the case, the accused were found guilty
of murder, though no proof was or could be given of the finding
of the body, and no direct evidence offered of the actual infliction
of any blow. In the case of *Macken v. Attorney-General for New*
South Wales (2)—a baby-farming case—in which the accused had
been found guilty of the murder of an illegitimate infant entrusted
to their care, evidence was given on behalf of the prosecution of
the finding of the remains of other infants in the gardens or
grounds of houses occupied or frequented by the accused, but no
evidence was produced of identification of the remains, which in
several instances consisted only of bare skeletons. The Supreme
Court of New South Wales was unanimous in sustaining the
conviction; and upon appeal to the Privy Council upon the ground,
inter alia, that the above evidence was improperly received in the
absence of identification of the bodies, the appeal was dismissed.

(1) 2 Leach, Cases in Crim. Law, 569.

(2) [1894] A. C. 57.

Cr. Ca. R. In the notorious *Crippen Case* (1) the body of the victim had been
 1917. dismembered, and only some fragments were found, upon one of
 R. which there was a scar identical in nature and position with one
 v. proved to have been on the body during lifetime as the result of
McNICHOLL. an operation; but I have myself no doubt that even in the absence
 Sir James of that particular piece of evidence, the jury in that case would
Campbell C.J. have been entitled, upon the other facts in evidence, to have con-
 victed the accused.

When Solicitor-General I took part some years ago in a remarkable charge of murder which was tried before my colleague, Mr. Justice Kenny, and in which the material facts were as follows:—The accused was a farm servant, and was alleged, under the influence of unfounded jealousy, to have fired from behind with a revolver at his master as the latter was entering a loft with a lighted lamp to obtain hay for his cattle. Very shortly afterwards the loft was found in flames, and the following day, in removing the debris, a charred trunk was found, but the head had wholly disappeared, and no trace of it was ever found. The trunk had upon it at the back of the neck a small orifice which, when explored, was found to indicate the track apparently of a small bullet. The course led upwards, suggesting that the bullet, which was never found, had lodged in the head, but no actual identification of the trunk as part of the body of the murdered man was given or could be given, yet the jury convicted the accused upon the circumstantial evidence in the case. I am told that in India it is not an uncommon incident for low-caste natives, after committing a murder, to sever the victim's head from the body, and destroy or conceal it, so as to render identification difficult or impossible; and in this connexion it is not unimportant that the accused in the case I have mentioned had served for a number of years as a soldier in India. In the case of *Regina v. Hannah Hopkins* (2) a young woman was charged with the murder of her illegitimate child, the only material evidence being that she was seen one evening at six o'clock on the bank of a river with the child, and returned between eight and nine

(1) Tried at the Central Criminal Court, London, before Lord Alverstone C.J., on October 18th, 1910, and following days. Unreported on this point.—*REP.*

(2) 8 C. & P. 591.

o'clock the same evening without the child, which was never seen or heard of again. Shortly afterwards the body of an infant was found in the same river, but evidence was given negating its identity with that of the body of the missing infant; and Lord Abinger, then Chief Justice, directed the jury to acquit, stating that the prisoner could not by law be called upon to account for her child or say where it was unless there was evidence to show that her child was actually dead. The vital distinction between the facts of that case and the present is the absence of any proof, either by confession of the girl or otherwise, of the fact of murder; and this brings me to the consideration of the last but not the least important point in the present case, namely, whether in a charge of murder, in which the accused has directly confessed to the actual commission of the crime, and there are circumstances proved which corroborate the confession, the jury is at liberty to convict in the absence of any proof of the finding of the dead body. In this connexion Mr. Henry has, as he was entitled to do, most strongly relied upon the judgment of FitzGerald J. in *The Queen v. Unkles* (1), and of Palles C.B. in the case of *The Queen v. Sullivan* (2). In *The Queen v. Unkles* (1), which dealt with the comparatively trivial offence of revealing the secrets of the ballot, FitzGerald J., having referred to Sir Matthew Hale's rule, which he describes as one rather of judicial practice than as part of the law of evidence, proceeds (at p. 58) as follows:—"It would perhaps be at present more correct to define it thus, that a party accused of homicide ought not to be convicted on his own confession *merely*, without proof of the finding of the dead body, or evidence aliunde that the party alleged to have been murdered is in fact dead." The case of *The Queen v. Sullivan* (2) is a remarkable instance of the extraordinary thoroughness with which that distinguished judge, Palles C.B., always exhausted the law upon the particular question he was dealing with, because the sole question at issue was as to the effect of a publication by the accused in a newspaper; or which he was the proprietor and publisher, of an account of the holding of a certain prohibited meeting, there being no other evidence that any such meeting was, in fact, held. The Chief Baron deals elaborately with the

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(2) 20 L. R. Ir. 550.

Cr. Ca. R. 1917. R. v. McNICHOLL. Sir James Campbell C.J. general question as to the extent to which the confession of the accused may of itself supply the necessary proof of the corpus delicti in criminal cases; and while expressly deciding that it can do so in all other cases, he seems by the following passage to treat the case of murder as the exception. These are his words, and they will be found on p. 570 of the report:—"The second portion of the passage cited from Lord Hale refers to homicide only. 'I would never convict any person of murder or manslaughter unless the fact were proved to be done, or at least the body was found dead'; and it does, I think, lay down a proposition which has been acted upon ever since (whether as a matter of judicial practice, as stated by FitzGerald J., or as a caution, which was the view of Maule J. in *The Queen v. Burton* (1), or as part of the law of evidence, does not affect the question here; but whichever it may be, it is now settled), that in no such case ought a confession to be acted upon without evidence of the corpus delicti, by proof of the act done or of the body being found dead; and, as I think, found dead under such circumstances as raise a presumption that the deceased came by his death by unlawful means." It will at once be seen that the Chief Baron materially extends the proposition of FitzGerald J. by the omission not only of the important word "merely," but also of the entire sentence—"Or evidence aliunde that the party alleged to have been murdered is in fact dead"; so that in his view apparently it is not open to a jury to convict in the case of homicide upon a confession of his guilt by the accused, in the absence of proof of the finding of the dead body, even though there was evidence aliunde that the party alleged to have been murdered was, in fact, dead. I confess to the greatest difficulty in following the reasoning of Palles C.B. when he assumes that this tremendous effect must be given to Sir Matthew Hale's dictum, especially if it is to be regarded, as it was by Maule J., as a caution merely; but the point to which I desire to call special attention is that in the passages I have just quoted these two most learned and distinguished judges expressly extend the application of this so-called settled principle to cases where the proof relied upon is, as in this case before us, the voluntary confession of the

(1) Dears. C. C. 282.

accused. But the language of Sir Matthew Hale, upon which the Chief Baron bases his proposition, contains no such extension, and I have asked in vain and searched in vain for any decision which supports, much less establishes, the proposition that, in the absence of proof of the finding of the body, the confession of the accused cannot supply proof that the act was done, unless for this purpose the doubt expressed upon the precise point by Mr. Justice Patteson in *The King v. Edgar* (1) can be relied upon as an authority. Further, I am wholly unable to reconcile this proposition with the strong approval which each judge in his same judgment gives to the well-known principle of our common law, by which in criminal cases a confession of his guilt by the accused is regarded as evidence of the clearest admissibility and highest importance. In *The Queen v. Unkles* (2) FitzGerald J. states at page 57 of the report:—" 'Habemus optimum testem confitentem reum' is a maxim of the law of evidence, and it is not open now to doubt that the mere confession of the accused alone is sufficient to warrant his conviction." In *The Queen v. Sullivan* (3), at p. 565, Palles C. B. expresses his complete approval of the decision of the twelve judges in *The King v. Lambe* (4), in which they declare that "confessions of guilt made by a prisoner to any person at any moment of time, and at any place, . . . are at common law admissible in evidence as the highest and most satisfactory proof of guilt." Speaking of these words, used in a case in which, as the law then stood, the accused if convicted was liable to sentence of death, the Chief Baron explicitly states that they contain no qualification of the facts which may thus be proved, nor exclude those which constitute the *corpus delicti*; and yet a little further on in the very passages upon which Mr. Henry has so strongly relied the same judge expressly qualifies, in the case of homicide, the facts which may thus be proved, and expressly excludes, in the case of the same crime, the facts which in every other criminal charge would constitute the highest proof of the *corpus delicti*, namely, a confession by the accused that the fact has been done, and that he committed it. I have failed to find any ground either of principle or in authority to justify any such qualification or

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(1) Russell on Crimes, 7th ed.,
p. 2156, note.

(3) 20 L. R. Ir. 550.

(2) 1. R. 8 C. L. 50.

(4) 2 Leach C. C. 552, at p. 554.

Cr. Ca. R. exclusion; and if it is conceded, as it now must be, that in the
 1917. case of every other crime a confession by the accused is the
 R. highest and most satisfactory proof of guilt, we are not bound to
 v. give effect to such a serious and dangerous exception, holding as
McNICHOLL. we do that this Court is not bound by a judicial pronouncement
 Sir James upon such a momentous matter in cases in which the precise ques-
Campbell C.J. tion did not arise for argument or decision. The attempt to apply
 Sir Matthew Hale's dictum to a case in which the confession of the
 accused in itself supplies the proof of the corpus delicti is, in my
 opinion, in direct conflict with the dictum itself, because in such a
 case the essential element required by Sir Matthew Hale, namely,
 proof that the fact was done, is supplied by the highest and most
 satisfactory evidence. I can quite conceive many instances in
 addition to the familiar case of murder upon the sea and to those
 suggested in argument before us by the Attorney-General in which
 the dead body cannot be found, nor any proof be forthcoming,
 except the confession of the accused, that the fact was done, but yet
 in which surrounding circumstances, such as antecedent threats by
 the accused, the finding upon him when arrested, or in his house,
 of articles proved to have been in the possession of the missing
 man when last seen alive, the discovery of a murderous weapon,
 blood stains, and indications of a struggle upon the scene described
 in the confession, might supply, in the opinion of a reasonable
 jury, a convincing case of guilt; yet in every such case, if we were
 compelled to admit the exception in question, the case must be
 withdrawn from the jury. Assume, for example, that in *The*
King v. Hindmarsh (1) there had been no evidence that the accused
 was seen to seize the captain and throw him overboard, but that
 he had himself confessed that he had killed his victim with the
 billet of wood and cast the corpse into the sea, the proof that the
 fact was done would have been established by the highest and
 most satisfactory proof, as compared with the meagre evidence of
 the member of the crew, and yet if the proposition of Palles C.B.
 is sound, *Hindmarsh*, in the case I have put, must have been
 acquitted. In *The King v. Hindmarsh* (1) not only was the body
 never found, but the proof of the factum of killing was entirely
 circumstantial, whereas in the present case we have the direct

(1) 2 Leach C. C. 569.

confession by the accused of the actual commission of the crime coupled with strong circumstantial proof of the truth of the confession. Mr. Henry has strenuously argued that the proposition of Palles C. B. in *The Queen v. Sullivan* (1) means, and can only mean, that in every case of homicide in which there is no evidence of the finding of the dead body, but in which the proof of the fact of murder is the confession of the accused, the case must be withdrawn from the jury, no matter how powerful by way of corroboration of the confession the surrounding circumstances may be, provided such circumstances per se, and in the absence of a confession, would be insufficient to establish that the deed was done. Mr. Henry was compelled by the exigency of the case before us, in which in the opinion of all the members of the Court there was abundant material to corroborate the confession, so to construe the Chief Baron's dictum. Mr. Henry seems to be entitled so to construe it because it plainly involves the somewhat startling assumption that, in the case of homicide, the confession by the accused is no proof that the act was done, and in this respect it differs essentially from the dictum of FitzGerald J., which does not extend beyond the proposition that in a case of homicide, where there is no evidence of the finding of the dead body, and the only proof that the deed was done is the confession of the accused, *without any evidence aliunde*, the case must be withdrawn from the jury. Such a proposition is of a much narrower kind, but, as is plain and as Mr. Henry has conceded, would not avail him upon the facts of this case, and it is, therefore, not essential for us to pronounce upon it; but, speaking for myself, I am not prepared to accept it as an inflexible rule of judicial practice. The true view, in my opinion, is that even in such a case it is the duty of the judge to let the case go to the jury, with a warning, increasing in gravity in proportion to the improbability or extravagance of the confession itself, that they should exercise the greatest care and caution before convicting. As to the more extended proposition which Mr. Henry insists to be the true and logical construction of the language of Palles C.B., it is of the utmost importance, having regard to the nature and gravity of the crime of murder and the sanctity of human life,

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(1) 20 L. R. Ir., at p. 570.

Cr. Ca. R. 1917. *R. v. McNicholl.* Sir James Campbell C.J. that our decision should not be left in any state of doubt or ambiguity; and I, therefore, express in the clearest and strongest way the unqualified dissent of every member of this Court from the proposition that the case of murder is an exception to the general and accepted principle of our common law that the confession of the accused may be the highest and most satisfactory proof of guilt, and our refusal to give any countenance to the proposition that in a charge of murder, in which the accused has made a full and free confession of the commission of the crime, and in which at the trial there is evidence aliunde which, even though it may be insufficient of itself to prove that the fact was done, corroborates the truth of the confession, the case can never go to the jury unless there is proof of the finding of the dead body. As to Sir Matthew Hale's dictum, we entirely accept the view which is expressed in Chitty's Criminal Law, 2nd ed., vol. iii, p. 738, in the following words:—"This rule must be taken as a caution rather than as a maxim to be universally observed; for it would be easy in many cases so to conceal a body as to prevent it from being discovered."

We also approve and adopt the criticism upon it of Russell on Crimes, 7th ed., p. 823, which is as follows:—"The true principle seems to be that the rule is properly applicable only in cases where it is sought to presume death from the disappearance of the person said to be deceased," or, in other words, that Sir Matthew Hale's dictum deals with presumption only, and merely amounts to the proposition that, in cases where there is no proof that the fact was done, no presumption of murder arises from proof only of the fact that the alleged murdered person has disappeared, and, if so understood, it is clear that it has no bearing whatever upon a case like the present, in which there has been the clear confession of the accused. Just one word more as to the onus of proof in cases where the dead body has not been found. While we entirely agree in the opinion of Lord Abinger as expressed in *The King v. Hannah Hopkins* (1), that where the only evidence against the accused is the fact that he was proved to be in possession of a living infant, which directly or shortly afterwards disappeared, and was never traced, the accused cannot be called upon to account

(1) 8 C. & P. 591.

for the child or say where it is, we are satisfied that where in addition, as in the present case, the accused has confessed to the murder of the infant, the failure by him upon his subsequent trial to produce it or account for its absence is evidence against him to which the jury are entitled, if they think fit, to attach importance. We are of opinion that this is also the law in cases in which the person alleged to have been murdered is an adult; but the weight of such evidence is much greater when, as in the present case, the alleged victim is an infant only a few months old, and incapable by itself of any change in its custody or abode. The accused in this case removed the control and custody of his illegitimate child from its mother by a subterfuge, and from that hour it had never been seen again; but after repeated false statements as to where and how he had disposed of it, he finally confessed to having killed it by suffocation within a few minutes after he had obtained possession of it. It is true that the statement in his confession that he had interred its dead body in his mother's grave is apparently false, but was doubtless made in the hope that he might in this way soothe the outraged mother, and succeed in persuading her to yield to his passionate appeals not to betray him to justice. Upon the facts of this painful and dreadful case, which are so graphically and minutely set out by Gibson J., we are unanimous in the opinion that there was evidence upon which the prisoner could be properly convicted, and that the case, therefore, could not have been properly withdrawn from the jury, and that the conviction should be affirmed. I have only to add that my colleagues have had the opportunity of considering this judgment, which is therefore to be taken as the unanimous judgment of the Court.

Solicitor for the Crown: *R. H. Todd, Crown Solicitor for Londonderry.*

Solicitor for the accused: *Michael C. Feeny.*

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IN THE MATTER OF THE CAVAN CENTRAL CO-OPERATIVE AGRICULTURAL AND DAIRY SOCIETY, LTD.,
AND IN THE MATTER OF THE FINANCE (No. 2) ACT,
1915 (1).

Revenue—Excess profits—Finance (No. 2) Act, 1915 (5 & 6 Geo. 5, c. 89, ss. 38, 39, 45, Schedule 4, Part III, s. 10)—Exemption of business of “husbandry”—Registered Co-operative Dairy Society—Liability to excess profits duty.

A co-operative society, registered under 56 & 57 Vict. c. 39, carrying on under its rules the manufacture and sale of butter in the interest of its members, who supplied milk for the purpose, is not carrying on the business of husbandry so as to be exempt under s. 39 of the Finance (No. 2) Act, 1915 (5 & 6 Geo. 5, c. 89), from duty for excess profits, imposed by section 38 of that Act.

CASE STATED, under sect. 59 of the Taxes Management Act, 1880 (43 & 44 Vict. c. 19), by his Honour Judge Brown, County Court Judge for the County of Cavan.

The following are the material passages of the case stated by the learned County Court Judge:—A rehearing by me of an appeal by the Cavan Central Co-operative Dairy and Agricultural Society, Limited, to the Special Commissioners of Income Tax, was held at Cavan on the 20th January, 1917. The Special Commissioners had confirmed an assessment of £108, made against the society for excess profits duty for the period ending 31st December, 1914. The only witness examined before me was C. E. Costelloe, the secretary of the said society; and the following facts were established to my satisfaction:—

1. The society was established in the year 1907 by a number of farmers of the district for the purpose of the better marketing of some of their farm products, and was duly registered under the Industrial and Provident Societies Act, 1893 (2). A copy of the rules was produced and put in evidence before me, and is incorporated herewith.

2. The only work carried on by the society during the accounting period was that of a creamery.

(1) Before GIBSON, MADDEN, and KENNY JJ. (2) 56 & 57 Vict. c. 39.

3. The method of working the creamery was as follows:— *K. B. Div.*
 The members, all of whom were farmers grazing cows upon their *1917.*
 farms, brought milk each day to the creamery, and had the
 amount thereof entered up in a suppliers' pass-book. The
 milk was churned, the skim milk returned to the suppliers,
 and the butter sold. This process continued during a month,
 during which time no cash return was made to the suppliers for the
 milk, and no price or rate per gallon struck therefor. At the end of
 each month a meeting was held by the committee, and the returns
 of the yield for butter sold, and also for the aggregate working
 expenses for the month were laid before the committee on a form
 headed "Estimate of Trading for the Month." The sum to be
 distributed for the past month's milk was thus ascertained, and
 was subsequently received rateably by the suppliers, and was in
 proportion to the respective quantities of milk supplied by each of
 them. The price or return thus received by the farmers on a milk
 basis depended entirely on the total amount received for the butter.
 Cheques were issued, usually about the 12th day of each month,
 to the suppliers in respect of the butter sales of the immediately
 preceding month. A successful month's selling would slightly
 increase, and a low butter price for a month would correspond-
 ingly decrease, the price or return which each supplier received for
 his milk.

4. Occasionally the committee thought it prudent to refrain
 from dividing out at once the entire proceeds of butter sales
 amongst the suppliers, but deferred paying a part of those
 receipts, in order to have money in hands to meet particularly
 heavy working expenses in any one month, such, for example, as
 might arise from a breaking-down in machinery, which would
 require to be mended immediately, perhaps at high outlay. These
 moneys so kept in reserve at any stated taking of monthly
 accounts were always treated as and dealt with by the committee
 as deferred payments; and if it turned out that they had not
 actually been required to be expended in working expenses for
 sudden emergencies (for which purpose they had been provisionally
 retained), they were ultimately distributed amongst the suppliers.

The surveyor of taxes referred to the Finance (No. 2) Act,
 1915, fourth schedule, Part I, sect. 10; and also cited the following

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K. B. Div. decisions:—*Curtis v. Old Monkland Conservative Association* (1);
 1917. *Mersey Docks and Harbour Board v. Lucas* (2), followed in *City of*
In re
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 SOCIETY. *Dublin Steam Packet Co. v. O'Brien* (3); *Maughan v. Free Church*
of Scotland (4), and *Tennant v. Smith* (5).

I was of opinion on the foregoing facts that in point of law there were no "profits" or "surplus" of the society which could be the subject of income tax; and also that there are no "excess profits" which could be assessed with excess profits duty under Part III of the Finance (No. 2) Act, 1915.

I was also of opinion that milk-producing, or the keeping of milch cows by a farmer for dairy purposes (including the making of butter), was "husbandry"; and this view I understood was acquiesced in by the surveyor of taxes. I was further of opinion that it did not cease to be "husbandry" if two or three or more farmers joined together and appointed common servants of all, to work for all at buttermaking for the purpose of (a) saving the expenses of many separate churnings on separate farms; (b) cleanliness; (c) having modern appliances and skilled butter workers; (d) the production of a standard quality of butter from hundreds of cows; and (e) thus obtaining a better market, or for any of these or other reasons. On the facts proved the society, though registered and entitled as aforesaid, was nothing more than this in reality; and simply acted as the churning and marketing servant of the farmers, who are the members and suppliers, continuously selling their butter. I was, therefore, of opinion that the business carried on by the society during the accounting period was "husbandry," and that it came within the exemptions contained in the Finance (No. 2) Act, 1915.

Accordingly, on this ground as well, as on the before-mentioned ground of the absence of profits chargeable with excess profits duty, I allowed the society's claim to be exempt, and discharged the assessment. The figures were agreed upon; and if I am wrong in both said rulings, the society should be assessed for £108 in respect of the said accounting period; if I am right in either of said rulings, the assessment should remain discharged."

(1) [1906] A. C. 86.

(2) 8 A. C. 891.

(3) Not reported.

(4) 30 Sc. L. R. 666.

(5) [1892] A. C. 150.

Though not incorporated with or referred to in the case, it was admitted in argument that the learned County Court Judge had in evidence before him the balance-sheet of the society for the accounting period and the auditor's certificate thereon. On this balance-sheet there was a sum of £9 1s. 8d. of receipts which counsel for the society admitted could not represent creamery sales.

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The rules of the society, incorporated in the case stated, consisted of (a) general rules framed by the Co-Operative Union, Limited, for industrial and provident societies, registered under 56 & 57 Vict. c. 39, and (b) special rules framed for the Cavan Central Co-Operative Dairy and Agricultural Society. The following are the material portions of the special rules:—

Rule 2. The special object of the society shall be to carry on the occupations of commission agents, wholesale and retail dealers in farm and garden produce, seed, artificial manures, dairymen, millers, manufacturers of butter, cheese, and other dairy produce, and to carry on any occupation or manufacture in any way allied to agriculture; exporters and importers of live stock, and general dealers in any class of goods the Committee may direct.

Rule 5. At least one-half of the net profit arising from the general business of the society, after providing for the charges specified in the general rules, and for the payment of interest on the share capital at a rate not exceeding £5 per cent. per annum, shall be carried to the reserve fund until the latter equals the share capital. The remainder of such profit shall be divided amongst the members in proportion to their sales through, and purchases from, the society during the period to which the division relates. When the reserve fund equals the share capital, the general meeting shall decide as to the amount to be placed to the reserve fund in each year thereafter.

Rule 6. Credit: The Committee may, at their discretion, give credit to any member of the society subject to the following rules [Rules 7, 8, and 9].

Rule 10. No member shall receive credit for any goods purchased through or from the society other than feeding stuffs (not including corn products), fertilizers, seeds, and implements for any term exceeding one month.

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Rule 13. Dairying : The net profits arising from the business of dairying, after providing for the charge specified in General Rule 114, and for the payment of interest on share capital at the rate not exceeding £5 per cent. per annum, shall be allotted as follows :—

(1) Not less than 10 per cent. of the net profit shall be allotted to the workers employed by the society, in proportion to the wages earned by them respectively during the period to which the division relates, or in such other way as the Committee may direct or appoint.

(2) The remaining profits shall be appropriated to the individuals from whom the society has purchased milk or cream, in proportion to the value of milk or cream supplied by each to the society during the period to which the division relates. Provided that an individual, who is not a member of the society, shall only have allotted out of the profits a sum equal to half the amount to which he would have been entitled as a member. The difference between half and full dividend shall be placed to the reserve fund.

(3) All applications of profit under Clause 2 shall be made by shares, or payments on account of a share, which shall be appropriated to the persons respectively entitled thereto, subject to the provisions following :—

(a) The Committee shall, within one month of the date of the declaration of profits, notify all persons entitled under this rule to share in such profits of the amount which has been allotted to them.

(b) If a person, not a member, to whom a share has been allotted under Clause 1 applies to be admitted a member and is refused, his share shall be paid him in cash.

(c) If any such person does not apply for admission within six months after the allotment of shares to him, his share shall be forfeited and carried to reserve, subject to the power of the Committee to remit such forfeiture in any case where the delay in making the application is explained to their satisfaction.

(d) When a member has at least one fully paid up share standing to his credit in the books of the society, all future dividends may be paid in cash.

(4) The share of profits falling to the workers shall not be

paid in cash, but shall be accumulated as a loan in the society, bearing such interest as any general meeting may determine, and shall only be withdrawable in case of distress or leaving the employment of the society, unless the Committee by resolution otherwise direct.

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The following are the material portions of the general rules:—

Chapter III. Membership. Rule 7 :—The society shall consist of the special members and of all such other persons as the special rules direct, or the Committee may direct.

Rule 8. Subject to the provisions of the Acts each individual member shall hold at least one transferable share.

Chapter V.—Shares.

Rule 37.—All the shares of the society shall be transferable.

Rule 44.—Any share may be transferred with the approval of the committee to any other member at the option of the transferor; but if the transferee is not a member he must be approved of as a member by the committee, or the committee and a general meeting, according to the provisions in the rules relating to the admission of members, before the transfer can be registered.

Rule 75.—The business of the society shall be managed by a committee of management, which shall consist of such number of committee men as the ordinary business meetings may fix from time to time.

The following were the charges specified in Rule 114 of the General Rules as payable out of net profits, viz.:—1, reduction of fixed stock at the annual rate of 10 per cent. on fixtures, and 2½ per cent. on shops, warehouses, and other buildings; 2, reduction of preliminary expenses (if any) incurred in forming the society at a rate of not less than £5 per cent. per annum, to be fixed by the committee; 3, dividend on share capital; 4, reserve fund; 5, educational fund; 6, congress funds, being the subscription to the Co-Operative Union, Limited; 7, social fund, including sick and general fund, if authorized by a general meeting, or by two successive ordinary business meetings.

G. W. Shannon (with him *Carrigan K.C.*), for the Special Commissioners of Income Tax:—

It is now admitted at the bar that if the society's business is

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not that of husbandry within the meaning of sect. 39 of the Finance (No. 2) Act, 1915 (5 & 6 Geo. 5, c. 89), there are excess profits taxable, and the amount of the assessment, £108, is not disputed. It is further admitted that the society's balance-sheet for the accounting period, and the auditor's certificate thereon, were proved before the learned County Court Judge, and counsel for the society admit that £9 1s. 8d. at least of the receipts shown on that balance-sheet is not in respect of creamery sales. On these admissions it is clear that the society has excess profits, and that those profits are not derived exclusively from the creamery business: in fact, the special rules of the society enable it to take up the occupations of commission agents, wholesale and retail dealers in agricultural produce, &c. There is no statutory definition of "husbandry"; but, in relation to the taxing statutes the expression "husbandry" must be read with the provisions of sect. 18 of the Customs and Inland Revenue Act, 1887 (50 & 51 Vict. c. 15), and of sect. 23 of the Customs and Inland Revenue Act, 1890 (53 & 54 Vict. c. 8), and these enactments show that the business of husbandry must be carried on in direct relation to the occupation of land. That is the natural legal interpretation: *Meux v. Copley* (1).

This society does not carry on business in connexion with the occupation of land. It is a mere manufacturing concern. The view that it is the farmers' servant could, with equal reason, be taken of the operations of a dairy company, such as the Maypole Dairy.

Finlay and S. L. Brown K.C. for the society:—

It is admitted that there is but a single question to be decided, namely, whether the business carried on by the society is "husbandry" within the exemption. It is clear that butter-making is a process of "husbandry": New English Dictionary, sub "Husbandry." If butter-making was carried on by the individual farmer it is clear that he could not be taxed for excess profits. This society is in fact a co-operation of several milk-producers for a common purpose—butter-making and the sale of butter. It is concerned with the production of human food. The Legislature

clearly intended exemption in the case of the production of human food, though produced and sold for profit. Encouragement to such production was the policy of the exemption, and it would be contrary to the principle of the statute to tax a co-operative society engaged in an admittedly important and improved process of production of essential food-stuffs.

It is true there are figures in the balance-sheet not relating to creamery sales; but the tax is imposed on a business as an integer, and the separate departments of the business producing the excess profits cannot be segregated.

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Carrigan, in reply :—

Under the Industrial and Provident Societies Act, 1893 (56 & 57 Vict. c. 39), s. 24, exemption from income tax is confined to societies not selling to the public. Schedule 4, sect. 10, of the Finance (No. 2) Act, 1915, contemplates societies of this kind being liable for income tax. This society is clearly merely a co-operative manufacturing society.

Cur. adv. vult.

GIBSON J. :—

The important point proposed for decision is, whether this Cavan Co-operative Agricultural and Dairy Society, Ltd., as described in the case stated, with its statutory rules, carried on a business of husbandry within 5 & 6 Geo. 4, c. 89, s. 39 (a), so as to be exempt from excess profits, assessed under sect. 38. The materials contained in the case as stated are insufficient and unsatisfactory. There is no reference to the report of the auditor, dated 31st January, 1915, and the statement of accounts and balance-sheet therewith incorporated, which were admittedly before his Honour, and which, obviously essential to the decision of the case, counsel for the society agreed should be dealt with as embodied in the case. These documents conclusively show that £9 1s. 8d. (as Mr. Brown admits) could not be for creamery sales; and the fact found by the judge was mistaken to that extent. Nor can I make out how purchases of milk shown in the accounts, creating the relation of debtor and creditor, can be reconciled

K. B. Div. with paragraph 3 of the case; for (as between members of the society) there would be no debt, on the dealing therein described, in respect of milk supplied by members. Nor can I follow the opinion of the judge, that there were no profits subject to income tax. Under the statute of 1893, c. 39, sect. 24, exemption is confined to a society which does not sell to persons outside its membership. This society sold the butter produced to the public. Most of the English industrial societies, we were told, were restricted in operation to dealings with and for the benefit of their members, and did not contemplate the sale of manufactured products in the open market. Mr. Brown did not attempt to support his Honour's view of the law, but confined himself to sect. 39, which he argued gave exemption to a business representing husbandry; such business as dairying for the production of butter was husbandry; the society was only agent for individual farmer members; and the business actually carried on, being confined to the production of butter from milk supplied by the members, the society representing such farmers was within the statutory exemption. Taking it that only farmer members supplied the milk; that when the butter-fat was removed the separated milk was returned (not sold back to the suppliers, as in the *Coolmoynne Case* (1)); that the butter was manufactured and sold by the society; that the profits consisted of the proceeds of such sales (after deducting expenses); and that such net profits were received by the members; was this registered society, bound by its statutory rules, entitled to exemption? I agree with Mr. Brown that dairying, whether for the production of butter or for feeding young stock, would be, in the case of an individual farmer, "husbandry," though that term, in ordinary speech, describes some kind of cultivation. Some tillage to supply roots is usually required for cattle. As the manifest object was the benefit of mankind and for the support of life, "husbandry" should receive a liberal interpretation. Whether a farmer uses his milk at home or vends it or the butter, or, after threshing his corn, sells it, he is engaged in a husbandry operation. In the statutes of 1887, c. 15, and 1890, c. 8, occupation exclusively for husbandry is required. "Husbandry" in sect. 39

(1) [1917] 2 I. R. 117.

probably contemplates the same thing; the exemption is for the benefit of the occupying producer of food, &c. Can this society be deemed to be occupying, through the supplying farmers, or is the society to be regarded as delegate or agent for such farmers? Mr. Brown put his argument on the latter ground. Schedule 4, sect. 10, assumes that an industrial society may be liable for excess profits; but it does not say all such societies are assessable. Some are liable for income tax, some free, but the business of husbandry can only with difficulty, if at all, be brought within the Act of 1893. Sect. 39 contemplates the immediate producer, and does not deal with the product of an independent manufacturing and selling body.

The benefit of husbandry is not confined to food. Sheep supply wool for clothing, cattle leather for footwear, and the price of the article sold may be exchanged for food, such as sugar or otherwise. The fruit farms in England are largely used for jam production; orchards for cider; and land may be planted with timber to be cut down, sawn, and sold when mature. Would a co-operative society, undertaking in the interest of its members flour or flax milling, the manufacture of leather from hides, jam from fruit, cider from apples, the cutting of wood at a saw-mill, the turning of wool into cloth, or milk into cheese, be engaged in husbandry as agents or as principals?

The society was an artificial person under the Statute of 1893, c. 39, with special remedies: sect. 23; special privileges as to its shares: sect. 27; as to its members: sect. 32; and other privileges and rights, as under sect. 24 and sects. 54 and 55. The society, registered on August 31st, 1907, had special rules which bound it. Rule 3 enabled it to undertake businesses of various kinds, not directly connected with husbandry and of a commercial character. The capacity of the society, created for the purpose of carrying on such multifarious businesses and invested with independent personality, is material on much of the argument. Rule 5 appropriated the net profit from the general business. Credit business might be transacted with members: rules 8 and 10. The net profits from the business of dairying (a term which includes manufacture of butter, cheese, and other dairy produce under rule 3), were to be allotted, as to 10 per cent., to the society's workers.

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K. B. Div. The worker's 10 per cent. was not to be paid in cash, but accumulated, under rule 10, sub-rule 7. If, as the case would suggest, this 10 per cent. has not been deducted for the workers, then to the extent that the members have been receiving that proportion of profit the society's fundamental rule would have been violated.

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Rule 13, with sub-sects. 2 and 3, is material. Sub-rule 2 directs the balance of net profits (after deducting the 10 per cent.), to be appropriated to the persons from whom the society has purchased milk or cream. This provision in sub-rule 2 applies to all such persons, members and non-members alike; but sub-rule 3 has special terms as to getting non-members to join. It will be observed that, under sub-rule 2, all participants are taken to be sellers of the milk or cream, or deemed so to be. No course of business could alter this cardinal rule. The farmers dealing with the society who get back their milk, after separation, were to be treated as selling the cream.

I do not think that the society, constituted under the Act of 1893, with special capacities and rights as a corporation, and subject to the special rules I have mentioned, can be regarded as mere agents of the farmer members. No authority has been cited to justify such a view in the case of such a society, a distinct legal person and entity: *Saloman v. Saloman & Co., Ltd.* (1); *Daimler Co. v. Continental Tyre Co.* (2). See also the judgments of Buckley L.J., in the *American Thread Co. v. Joyce* (3), and *Gramophone, Ltd. v. Stanley* (4). There is the additional difficulty that the business of the society does not appear to have been conducted in accordance with the special rules of the society—its articles of association. So far as the business actually carried on violated such articles it could hardly be brought within statutory exemption. Further, I think (assuming the business to be quite regular, and of the limited character described in the case), the manufacture and sale of butter was not such husbandry as the statute contemplated. How the sale operations of the society were conducted is not shown by the case. The business of the society

(1) [1897] A. C. 22.

(2) [1916] 2 A. C. 307.

(3) 106 L. T. 171.

(4) [1908] 2 K. B. at p. 105.

was, on the whole, more commercial than otherwise. It was not primarily and directly that of producers, though the farmer producers may have found the society a useful means of disposing of their milk or butter, or putting the latter on the market.

Finally (though I pronounce no concluded opinion on the point), I doubt if sect. 39, with schedule 4, sect. 10, following the statutes of 1887 and 1890, contemplates husbandry being carried on by societies under the Act of 1893, particularly in the case of societies selling to the public. Whether societies come within sect. 24 of the Act of 1893 or not they are liable under sect. 38, unless they can bring themselves within sect. 39. That a society liable to income tax should be exempt from excess profits does not appear quite reasonable.

The decisions cited below were not referred to or relied on by counsel on either side, and I have not, therefore, considered them.

Our answer to the case, for the above reasons, must be that the ruling of his Honour was erroneous, and that the assessment, not otherwise questioned as incorrect, must stand. In any view the decision below, so far as regards £9 1s. 8d., would be wrong. Mr. Carrigan, however, does not ask for any special direction as to that sum, if the broad question was decided against him. As I hold that the society has not escaped from the tax imposed by sect. 38, by proving its exemption under sect. 39, I only notice the point to avoid misconception.

MADDEN J. :—

I agree with Mr. Brown when he stated that in order to ascertain the meaning to be attributed to the word "husbandry" in the 39th section of the Finance Act of 1915, we must have regard to the state of facts in view of which the section was passed. I also agree with him—indeed it is a matter of common knowledge—that the mischief in the contemplation of the Legislature was an apprehended shortage of food.

What, then, is the meaning in the English language of the word "husbandry"?

According to the New English Dictionary it "signifies the business or occupation of a husbandman or farmer," and husband-

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K. B. Div. man is defined as "a man who tills or cultivates the soil, a
 1917. farmer." The word in time acquired a more extended signifi-
In re cation than the mere cultivation of the soil. To the definition of
 CAVAN Co- "husbandry" which I have quoted it is added, "including also
 OPERATIVE the rearing of live stock and poultry, and sometimes extended to
 SOCIETY. that of bees, silkworms, &c." The word would certainly include
 Madden J. the conversion by the husbandman of milk produced on his farm
 into butter or cheese. In a once famous book, published in the
 year 1557, by T. Tusser, entitled, "The Five Hundred Points of
 Good Husbandry," which was many times reprinted during three
 centuries, these and other industries, such as malting, and brew-
 ing, and candle-making, when practised by the farmer, are
 included in the five hundred points. The book is a quaint
 rhyming production; but I know of none of more value in
 ascertaining the meaning of the word "husbandry" in its ordinary
 use.

When this book was written, and when the English language
 was in course of formation, many industries allied to the
 cultivation of the soil were carried on by the husbandman with
 the aid of his household. The wool of his sheep was converted
 into yarn by the spinsters of his family, and woven into good
 homespun by the handloom in the farm house. His home-brewed
 ale was a matter of pride, and bread was baked of corn ground
 in the hand-mill or quern, which is an object of interest though
 its occupation is gone. All these and other industries, included
 in the comprehensive "et cetera" of the New English Dictionary,
 were branches of husbandry as long as they were carried on by
 the husbandman. In course of time, when, under different social
 and economic conditions, many of these industries were divorced
 from the occupation of the soil, and were carried on independently
 by individuals other than the farmer, in partnership or joint-stock
 companies, the word "husbandry" became inapplicable.

For example, no one would speak of a joint-stock company or
 an individual who carries on the business of a miller and con-
 verts the corn grown on a farm into flour, or the baker who makes
 it into bread, as engaged in "husbandry," although they are
 concerned in the production of human food from a substance pro-
 duced by the cultivation of the soil. Until the establishment of

creameries the work of butter-making was generally done on the farm, and when so carried on it could be described as a process of "husbandry." In the case before us the work is not done on the farm, and it becomes necessary to consider the conditions in which it is carried on.

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The Cavan Central Co-operative Dairy and Agricultural Society, Limited, is a society registered with limited liability under 56 & 57 Vict. c. 39. The business is carried on for profit. The members are not necessarily farmers or engaged in any business connected with husbandry or agriculture. The present case is, therefore, essentially different from one that has been suggested in argument where two or more farmers carry on together, as partners or members of a joint-stock company, some industry which would be regarded as included in the word "husbandry" if carried on by an individual husbandman. The business of the society, as defined by the second special rule, includes the manufacture of butter, cheese, and other dairy produce; but it includes also the occupations of commission agents, dealers in artificial manures, millers, and "any occupation or manufacture in any way allied to agriculture," and also the business of "general dealers in any other class of goods the committee may direct."

The 13th special rule is conversant with dairying. I will assume for the sake of argument that it is possible for the purposes of the present case to separate the business of dairying from the other businesses carried on by the society, and to deal with it as if it was incorporated for the purpose of this business alone. Under the 13th rule the net profits of this business, after providing for the specified primary charges, are to be applied in the first instance in payment to the workers employed by the society in proportion to the wages earned by them or in such other way as the committee may direct or appoint. The remaining profits are appropriated to the individuals from whom the society has purchased milk or cream. These are not necessarily members of the society, but members have the advantage over non-members that the latter only receive out of the profits a sum equal to half the amount to which they would have been entitled as members.

A society of this kind, when worked as the Cavan Society has been worked, is a great advantage to husbandmen, but it is,

K. B. Div. in my opinion, a misuse of language to describe its operations as husbandry. The business of butter-making, which is one of those carried on by it, is connected, like brewing, malting, and milling, with the production of human food, and the excess profits of such business, when carried on by the husbandman, come within the spirit and the letter of the exemption contained in the 39th section of the Act; but the position is altogether different when the business is carried on by a joint-stock company as distinct from the husbandman who produces the milk, and the fact that the incorporation of a company is due not to desire of gain but to a public-spirited intention to advance an important industry connected with the production of human food, and to improve the character of Irish butter, cannot alter its essential character. For these reasons I am of opinion that the case must be answered by saying that the learned County Court Judge was wrong in his decision that the business carried on by the society during the accounting period was "husbandry," and came within the exemption contained in the Finance (No. 2) Act, 1915.

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KENNY J.:—

The judgments that have just been delivered by the other members of the Court leave me scarcely anything to say unless to express my concurrence with them. The point in the case is a very short one—namely, whether the operation of this society in extracting butter from milk and the subsequent sale of the butter can be regarded as trade or business of husbandry, so as to bring it within the exemption from excess profits duty contained in the Finance No. 2 Act, 1915.

The argument that has weighed with me throughout the hearing has been that the work of the society in connexion with the milk which it receives from the suppliers is not the work of a producer but a mere mechanical operation that could not in its essence be regarded as husbandry. Husbandry presupposes a connexion with land and production of crops or food in some shape. The objects of the society we are dealing with are composite, and no doubt the conversion of milk into butter is one of its primary objects. It has certainly been so in practice, and it is

unquestionably a farming operation; but, taking it by itself apart from its association with other branches of farming industry, I cannot conceive how it could be regarded as husbandry. As well might the owner of a machine for threshing corn, or of a steam-plough, or of a mill for grinding corn, or of a machine for spraying potatoes, be held to be engaged in the trade or business of husbandry. I am clearly of the opinion that the society is not within the statutory exemption.

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Solicitors for the Commissioners: *W. Shannon.*

Solicitor for the Society: *Louis C. P. Smith.*

C. N. K.

DOWLING *v.* GRIFFIN (1).

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Criminal Law—Practice—Wreck—Receiver of Wreck—Right of Police to prosecute—Powers of Board of Trade.

June 1.

The right to prosecute for taking possession of wreck, and unlawfully failing to deliver the same to the Receiver of Wreck under sect. 518 (*b*) of the Merchant Shipping Act, 1894 (57 & 58 Vict. c. 60), is not confined to the Board of Trade or their officers.

An officer of police can prosecute in such a case without any authorization from the Board of Trade.

CASE STATED as follows:—

“At a Petty Sessions holden in and for the Petty Sessions district of Kilkee, in the County of Clare, on Friday, the 20th day of April, 1917, . . . the defendant was charged in and by a certain summons as follows:—‘The King at the prosecution of Patrick J. Dowling, D.I., R.I.C., complainant, *v.* Michael Griffin, senior, defendant. Whereas, a complaint has been made to me that you, the said defendant, having in the month of January, 1917, to wit on the 3rd January, 1917, at Killard, in the said county and district, taken possession of wreck not belonging to you, to wit one iron tank containing oil, did unlawfully fail to deliver up the same to the Receiver of Wreck for the said district and county, contrary to sect. 518 (*b*) of the 57 & 58 Vict. c. 60 . . .’; and the said parties respectively being then present, the hearing of the charge

(1) Before SIR JAMES CAMPBELL C.J., and GIBSON and KENNY JJ.

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was duly begun before us, and upon such hearing we ordered that the summons be dismissed without prejudice" (and having referred to the demand for a case stated, the case continued)—"At the hearing of the said complaint, objection having been made that the complainant was not an officer of the Board of Trade, it was contended on behalf of the complainant that 57 & 58 Vict. c. 60 being a public Act and the alleged offence being a criminal matter and affecting the public generally, any person might be complainant.

"And whereas upon the said hearing, we being of opinion that only the Board of Trade or one of their officers could be a complainant in the said summons, gave judgment against the complainant as aforesaid. We formed this opinion because we considered—

"1. That the offence set out in the said summons did not affect the public generally, being no more than a grievance affecting the Receiver of Wreck in his official capacity as agent for the owner of the foreshore and for the salvor of wreck.

"2. That 57 & 58 Vict. c. 60, which created the offence, limited the general rights of complainant by sects. 713 and 717 to the Board of Trade or their officers; and

"3. We are informed and believe that it is the practice for the Board of Trade to prosecute in such cases under 57 & 58 Vict. c. 60, and that even the Receivers of Wreck do not prosecute without the authority of the Board of Trade; and

"4. That we are informed and believe that legal proceedings under 57 & 58 Vict. c. 60 are now being taken at the suit of the Board of Trade in a similar case in this Petty Sessions district, although proceedings under the said Act by the Royal Irish Constabulary were contemplated.

"And hereupon the judgment of the Court is required as to whether we, the said justices, were correct in point of law in our determination as aforesaid, or as to what should be done in the premises."

St. L. Devitt and *Serjeant McSweeney*, for the complainant:—

The offence is under sect. 518 (b) of the Merchant Shipping

Act, 1894. Sect. 699 (2) prevents the informer from getting any part of the fine. Sect. 713 authorizes the Board of Trade to carry out the provisions of the statute. It was held in *Kenealy v. O'Keeffe* (1) that any member of the public might prosecute under article 12, clause 11, of the Application of Enactments Order of December, 1898. In the present case the matter affects the public generally. If the Board of Trade are not the only parties to put the law in motion, then any member of the public can prosecute. Unless the statute takes away the right any member of the public can sue: *Cole v. Coulton* (2); *R. v. Kennedy* (3). He also referred to *Anderson v. Hamlin* (4). In *Clarke v. M'Guire* (5) it was held that any member of the public might institute proceedings under sect. 40 of the Medical Act, 1858, and that the penalty went to the Medical Council. All classes of contraband may come on shore as wreck. In the majority of cases a receiver of wreck is a trustee for the Crown. A common informer may prosecute for trespass in pursuit of game. In sect. 356 of the Merchant Shipping Act, dealing with passenger regulations, the person to sue is named. They also referred to *R. v. Cubitt* (6); *Anderson v. Hamlin* (4): Halsbury, vol. ix, p. 293, pars. 604-5.

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There was no appearance for the defendant or the justices.

Cur. adv. vult.

The judgment of the Court was delivered by

SIR JAMES CAMPBELL C.J.:—

June 21.

The complainant in this case was a police officer, and charged the defendant with having taken into his possession at Killard, in the County Clare, wreck in the shape of a tank of oil, and failing, without reasonable cause, to deliver the same as soon as possible to the receiver of wreck for the district, in breach of the Merchant Shipping Act, 57 & 58 Vict. c. 60, sect. 518. Upon the hearing of the complaint objection was taken on behalf of the defendant to the right of the prosecutor to sue, upon the ground that under the Act the Board of

(1) [1901] 2 I. R. 39, at p. 43.

(2) 2 E. & E. 695.

(3) 86 L. T. 753, at p. 759.

(4) 25 Q. B. D. 221.

(5) [1909] 2 I. R. 681.

(6) 22 Q. B. D. 622.

K. B. Dw. Trade was specially charged with the administration of the jurisdiction over wreck, and, consequently, that the right to sue was expressly or by implication restricted to them, and the complainant, as a police officer, not being specially authorized by the Board of Trade had, therefore, no locus as complainant. The Justices yielded to this objection and dismissed the complaint. It has been the settled law ever since the decision in *Cole v. Coulton* (2), approved and adopted by the Court of Appeal, in the later case of *Rex v. Stewart* (2), that in the case of a penalty for an offence created by statute, and recoverable before a Court of Summary Jurisdiction, the right to sue is not restricted unless the statute by plain words or necessary implication confines it to certain specified persons. The Act of 1894 is divided into fourteen separate parts, each dealing with a separate subject-matter, and as regards certain offences there are special provisions as in sections 356 and 362 restricting the right to prosecute to certain specified individuals, and the absence of any similar specific provision in Part 10 of the Act dealing with wreck is the strongest argument negating any intention upon the part of the Legislature to abrogate the ordinary right of the Crown through its executive officers to prosecute in a case like the present. The Act also contains numerous sections dealing with the rights of passengers and the crew on ships, and imposing penalties in respect of which there is no limitation of the right to prosecute. It also contains strict provisions controlling the power of marine store dealers to traffic in marine stores, with appropriate penalties as to which there is no limit placed upon the right to prosecute.

I have gone carefully through the numerous sections of Part 10, and have failed to find anything in them which in express terms limits the right to prosecute for this offence to the Board of Trade. The only sections to which we have been referred which could even by implication be construed as having this effect are 566 and 717. Sect. 566 is as follows:—"The Board of Trade shall have the general superintendence throughout the United Kingdom of all matters relating to wreck. . . ." These words certainly do not in plain terms take away the right of any executive officer of the Crown to prosecute, nor do they, in my opinion, necessarily or at

(1) 2 E. & E. 695.

(2) [1896] 1 Q. B. 300.

all raise any implication to the same effect. Sect. 717 reads as follows:—"The Board of Trade may take any legal proceedings under this Act in the name of any of their officers." I construe this section as an enabling one, merely giving the Board of Trade this right to sue, but not as exhausting the category of persons entitled to prosecute. In view, therefore, of the prima facie claim of the Crown to "wreck, flotsam, and jetsam," and to the necessity, more especially in the time of war, for prompt and speedy action in the assertion of claims to, and the seizure of, such articles of wreck as petrol and similar munitions of war, it might be highly prejudicial to the safety and defence of the realm if the police or coast-guards were compelled to wait for the sanction and authority of the Board of Trade in such cases, instead of acting on the spot and taking immediate steps as servants of the Crown to secure the custody of all such articles, and it is therefore not inopportune that in this case we have been able to arrive at the clear conclusion that all such officers have the right, inherent in their office and subject to the obligation to account to the receiver of wreck, as well as subject to the power of general superintendence vested in the Board of Trade, to enforce this particular provision. I hope also that the fullest publicity will be given to the facts of this case and to the decision of the Court, so that all persons other than the owners, who get possession of such articles of wreck now so frequently cast upon our shores, may know that it is their duty to hand them over without delay to the receiver of wreck for their district, and that any failure upon their part in this respect may involve them in grave and serious responsibility. This case must be remitted to the justices, with an order to enter continuances and hear and determine the case according to law and in the light of our decision.

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1917.

DOWLING
v.
GRIFFIN.

Sir James
Campbell C.J.

Solicitor for the complainant: *The Chief Crown Solicitor.*

A. B. C.

K. B. Div. IN THE MATTER OF AN INTENDED ACTION BETWEEN THE
 1917. KILLINEY URBAN DISTRICT COUNCIL, AS PLAIN-
 June 21, 27. TIFFS, *v.* KATHLEEN KIRKWOOD, HENRIETTE
Appeal. KIRKWOOD, AND AMELIA MOORHEAD, AS DEFEN-
 July 25. DANTS; AND IN THE MATTER OF THE SUPREME
 COURT OF JUDICATURE (IRELAND) ACT, 1879
 (40 & 41 VICT. c. 57).

*Practice—Service out of the Jurisdiction—Claim for poor rate, urban improve-
 ment rate, and sanitary rate—Obligation affecting land—Contract made
 or entered into within the jurisdiction—Order 11, r. 1, sub-ss. b and f.*

The Killiney Urban District Council having applied, under Order 11, r. 1, of the Rules of the Supreme Court, for liberty to serve out of the jurisdiction a writ for the recovery of poor rate, urban improvement rate, and sanitary rate from the intended defendants:

Held by the Court of Appeal (1), affirming the King's Bench Division (2), that the claim was not one either in respect of an obligation affecting lands, or under an implied contract made or entered into within the jurisdiction, and that the application should be refused.

APPLICATION under Order 11, rule 1, for an order for liberty to serve out of the jurisdiction a writ in an intended action by the Killiney Urban District Council against the Misses Kathleen and Henrietta Kirkwood and Mrs. Moorhead, claiming the sum of £112 0s. 2d. in respect of poor rate, urban improvement rate, sanitary rate, and arrears for the financial years 1916 to 1917 and 1917 to 1918.

The intended defendants, during the financial years 1915 to 1916, 1916 to 1917, and 1917 to 1918, had been rated occupiers of premises in the Killiney Urban District. The rateable valuation of the premises was £115 a year. Up to 1911 all the intended defendants were in physical occupation of the premises. On her marriage in 1912 Mrs. Moorhead left the premises, and Miss Henrietta Kirkwood and Miss Kathleen Kirkwood left in the year 1915. In the year 1912 Mrs. Moorhead commenced

(1) SIR I. O'BRIEN C., RONAN & MOLONY L.JJ.

(2) PIM and GORDON JJ.

proceedings in the Chancery Division for sale and partition of the premises; but, at the intervention of a mortgagee, an order was made by the Master of the Rolls directing the sheriff to give possession to the receiver appointed by the Court. On the 27th April, 1917, the sheriff made his entry, and in order to give clear possession to the receiver, the furniture on the premises was all removed between that date and the 5th May following. The rate collectors of the Killiney Urban District were advised that they could not safely distrain for rates on the furniture on the premises in these circumstances.

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1917.
In re
KILLINEY
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KIRKWOOD &
MOORHEAD.

The demand notes for the rates on the premises were duly served on the intended defendants, but none of these rates had been paid, and, at the date of the application, all the intended defendants resided in London.

By direction the application *ex parte* was adjourned into Court.

Philip A. O'C. White, for the intended plaintiffs:—

The application should be granted as a cause of action covered by sub-section (b) or (f) of Order 11. The rates are an obligation affecting land. If a purchaser acquired the premises he would take subject to the obligation of paying the rates due in respect of the premises. In the case of *FitzPatrick v. Stewart* (1) Gordon J., following a previous similar order of Boyd J., gave leave to serve out of the jurisdiction a writ for recovery of poor rate.

In the alternative these rates are payable under an implied contract made or entered into within the jurisdiction. In *Blake-more v. Glamorganshire Canal Co.* (2) Lord Eldon, in dealing with a private Act, treated it as creating an implied contract, which the King's subjects were compelled to submit to for the public good (p. 163). It is submitted that the statutory provisions relative to rates, which obviate separate contracts between the local authority and the individual occupier, come within the reasoning of this decision.

If the Court should feel doubt as to jurisdiction to grant the application the proper course would be to make an order, as in

(1) 51 I. L. T. R. 14.

(2) 1 M. & K. 154.

K. B. Div. the case of *M'Loughlin v. Life Association of Scotland* (1), giving
 1917. liberty to issue the writ, and to serve the same out of the juris-
In re dictation, with a stay upon further proceedings, except entry of
 KILLINEY appearance, for a month from issue of writ, to enable the
 U.D.C. intended defendants to show cause why the order should not
 v. have been made.
 KIRKWOOD & MOORHEAD.

Cur. adv. vult.

PIM J. read the following judgment of the Court :—

In this case Mr. White has applied to us, on behalf of the Killiney and Ballybrack Urban District Council, for leave to serve a writ out of the jurisdiction claiming certain township rates due by the defendants. He relied in support of his application on rule 1, sub-rules (b) and (f), of Order 11 of the rules of Court.

His first contention was that a township rate is an obligation affecting land within the jurisdiction. Now, such a rate is not a charge on land, nor does it directly affect land. It has been decided that it is a personal obligation payable in respect of the occupation of lands: *Palmer v. Power* (2) and *Gloster v. Murphy* (3). So far as the defendants in this case are concerned, it could not be argued that it affects the lands in their hands at all, but Mr. White suggests that, inasmuch as a purchaser of these lands would be subject to rates due at the time of the purchase, to that extent, and from that point of view they must be held to affect the lands.

We are both of opinion, even assuming that the lands are affected in this indirect manner, that that fact does not bring an action for township rates within the meaning of rule 1 (b), and we think that on that ground the application must fail.

The point raised under rule 1 (f) is somewhat different. Mr. White argues that the relationship between the Urban Council and the ratepayer must be regarded as a statutory contract between them, and he referred us to the case of *Blakemore v. The Glamorgan Canal Co.* (4) as an authority for that proposition. In that case Lord Eldon, discussing the effect of private Acts of Parliament, gave it as his opinion that they must be regarded as

(1) 49 I. L. T. R. 166.

(2) 4 I. C. L. R. 191.

(3) [1894] 2 I. R. 49.

(4) 1 M. & K. 154.

contracts between the promoters of such Acts and the Legislature acting on behalf of the public and of all those who are affected by the said Acts, and Mr. White further argues that a contract entered into by the Legislature, on behalf of the persons affected by such Acts, is in effect a contract entered into between the promoters and each of such persons. Lord Eldon's views have been approved of by several eminent judges since, and I would particularly refer to Lord Selborne's judgment in the case of *Milnes v. Mayor of Huddersfield* (1). My colleague has authorized me to say that in his opinion such a contention is not valid, and he does not so understand Lord Eldon's judgment. I myself, while recognizing the great difficulty of the contention, am inclined to think that the legal relationship between the local authority and the ratepayer is that of statutory contractor and contractee. As, however, a disagreement would have the same effect as a refusal of the motion, and as the point is of some importance and ought to be decided by the Court of Appeal as soon as possible, I will not differ from Mr. Justice Gordon.

We accordingly refuse Mr. White's application but the order will be made up as a Court Order, so as to give Mr. White an opportunity of going immediately to the Court of Appeal to have the matter decided.

C. N. K.

The applicant appealed to the Court of Appeal (2), which affirmed the decision of the Court below. July 25.

Solicitor for applicant: *Robert Powell*.

C. L.

(1) 11 A. C. 611.

(2) In the Court of Appeal before SIR IGNATIUS J. O'BRIEN C., and
RONAN and MOLONY L.JJ.

K. B. Div. RODERICK P. O'CONNOR AND OTHERS, PLAINTIFFS, v.
1917. BLAIN, CAMPBELL, AND M'LEAN, LTD., DEFENDANTS (1).
Nov. 15.

Practice—Costs—Agreement to settle action on terms arranged by senior counsel—Issue of briefs to counsel before notice of trial or discovery—Consent to pay solicitor and client costs in action—Charges for briefs to counsel—Order 65, rules 19, 20, and 64.

The parties to an action, after the pleadings had been closed, agreed to refer the settlement of the action to their respective senior counsel. *Held* that the issue of briefs to senior and junior counsel was a reasonable mode of instructing them for the purpose of the settlement, and was not improper, although there had been no discovery obtained or notice of trial given. Charges for and in respect of such briefs and the fees thereon may be allowed on taxation as solicitor and client costs.

MOTION on behalf of the defendants to review the taxation of costs in the action as regards certain items of the plaintiffs' bill of costs, to vary the certificate of the Taxing Master accordingly, and to restrain the plaintiffs from taking steps for the purpose of entering or registering the judgment for costs in the action, and extending the judgment to Scotland pending the final result of the taxation.

After the action had been instituted Mr. O'Connor, father of Roderick O'Connor, one of the plaintiffs, called upon the defendants' solicitors and made certain suggestions for a settlement of the action; the defendants' solicitors suggested that the plaintiffs' solicitors should approach them on the subject. Mr. O'Connor then wrote to the defendants' solicitors on the 30th December, 1916, discussing the lines of settlement, and suggesting that "the question of amount be left to the respective senior counsel to settle." A few days later the defendants' solicitors informed the plaintiffs' solicitors of Mr. O'Connor's interview and the suggestions made for a settlement. On the 11th January, 1917, the plaintiffs' solicitors wrote to the defendants' solicitors giving their

(1) Before DODD J.

views as to a settlement, and suggesting in case the matter was not susceptible of an arrangement on the lines indicated, "senior counsel on each side should be empowered to settle it." On the 27th January, 1917, the defendants' solicitors replied accepting the suggestion to leave the matter in the hands of senior counsel, and asking the plaintiffs' solicitors to "instruct Mr. Serjeant Sullivan K.C., plaintiffs' senior counsel, to communicate with Mr. Denis Henry K.C.," who was retained by the defendants. At this time no discovery order had been made, although the plaintiffs' solicitors on the 13th December, 1916, and 11th January, 1917, had intimated to the defendants' solicitors that they were about to apply for such order. No case for proofs had been prepared, nor had any directions for proofs been given by counsel, nor was any notice of trial given.

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1917.
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v.
BLAIN,
CAMPBELL, &
MCLEAN.

The action was finally settled by the two senior counsel retained respectively for the plaintiffs and the defendants, and the terms of the settlement were embodied in a consent made dated the 6th July, 1917, and made a rule of Court on the 10th July, 1917. That consent inter alia provided that "the defendants pay to the plaintiffs their costs as between solicitor and client when taxed and ascertained not exceeding the sum of £160 within 10 days of date of certificate of the result of taxation."

In pursuance of the order of the Court on the rule the Taxing Master proceeded to tax the costs as solicitor and client costs payable by a third party. The items objected to were as follows:—

1. Instructions and case for counsel to advise on the contract: allowed £2 2s.
2. Draft case to advise: allowed £2.
3. Fair copy of case for counsel: allowed £1 2s. 4d.
4. Paid fee to Serjeant A. M. Sullivan K.C., for advising: allowed £5 5s.
7. Copy opinion: allowed 1s.
127. Instructions for brief for counsel on trial: allowed £10 10s.
128. Draft brief for counsel: allowed 15s. 4d.
129. Brief, pleadings, and documents for Serjeant Sullivan K.C.: allowed £9 11s. 8d.
130. His fee: allowed £15 15s.
131. Attendance: allowed 6s. 8d.
132. Brief, pleadings, and document for Mr. Timothy Sullivan B.L.: allowed £4 15s. 10d.
133. His fee: allowed £10 10s.
134. Attendance: allowed 6s. 8d.
152. Perusing consent: allowed 5s.
155. Attending counsel with

K. B. Div. draft consent for revision: allowed 3s. 4d. 156. His fee: allowed
 1917. £1 1s. The Taxing Master by his report dated 1st November,
 O'CONNOR, 1917, reported as follows:—

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“As to item 127 [instructions for brief for counsel on trial], I consider the sum I have allowed, viz. £10 10s., is only remuneration for the actual work done, and is a proper and reasonable sum. I consider that Order 65, rule 20, does not apply, as the work was necessarily and properly done to enable counsel to arrive at a settlement of the action. I have allowed the briefs to counsel, as it must have been known to Mr. Henry K.C. and Serjeant Sullivan that the briefs were in their possession; and it appears to me quite reasonable and proper to instruct counsel in the manner adopted by the solicitors for the plaintiffs, which was a reasonable and proper one. Had an agreement failed to be come to, the work done would have enured to the benefit of the clients. Indeed, all the objections are, in my opinion, not well founded, as all the charges objected to are proper and reasonable charges.”

Overend, for the defendants:—

Under the terms of the consent the defendants are only liable for costs incurred in the action. Items 1 to 7 inclusive are charges for preliminary work; and, even assuming they were charges incurred in the action, they could not be taxed as party and party costs. No proof was tendered that the work was done at any previous request in writing, or of ratification, or that the work was urgent and the previous consent of the client could not be obtained (Order 65, rule 20). As to items 127 to 134 inclusive, the briefs charged for were not briefs for counsel “on the hearing or trial of action upon notice of trial” (R. S. C. Appendix S (73)). The arrangement between the parties was that there was to be a settlement by senior counsel. There was no discovery and no notice of trial (Order 65). Instructions to senior counsel would have been sufficient; but admitting that a brief, in the circumstances, could be given to senior counsel for the purpose of the settlement, the charges for a brief to junior counsel cannot be supported. As to items 152, 155, and 156, no such item as “perusing consent” appears in the Schedule of Fees (R. S. C. Appendix S, Part 1). Under Order 65, rule 64 (13), only costs of procuring

advice of counsel on pleadings and proceedings, and procuring counsel to settle such pleadings, proceedings, and special affidavits, are taxable. A consent is not a proceeding, pleading, or special affidavit, and these charges are not taxable either as party and party or solicitor and client costs.

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Serjeant Sullivan K.C. and *T. Sullivan*, for the plaintiffs, were not called upon.

The Court made an order removing the restraint on the plaintiffs, taking steps to enforce their judgment for costs, and confirmed the Master's certificate in all respects.

Solicitors for the plaintiffs: *Little, Doyle, & Woods*.

Solicitors for the defendants: *D. & T. FitzGerald*.

C. N. K.

NEWELL v. STARKIE.

Appeal.
1917.

Tort—Malicious abuse of authority—Conspiracy—Public Authorities Protection Act, 1893 (56 & 57 Vict. c. 61).

Oct. 29, 30,
31.
Nov. 12.

APPEAL by the plaintiff from the judgment of the King's Bench Division, pp. 73, 83, ante.

Dickie K.C. and *Moonan*, for the appellant.

Powell K.C., *Pigot K.C.*, and *Maxwell*, for the respondent.

The Court of Appeal (Sir Ignatius J. O'Brien C., and Ronan and Molony L.JJ.) affirmed the judgment of the King's Bench Division.

Solicitors for the appellant: *Redington & Sainsbury*.

Solicitor for the respondent: *J. M. Maxwell*.

C. I.

H. L.

1917.

Oct. 29.

MACKEY, APPELLANT; JAMES HENRY MONKS
(PRESTON), LIMITED, RESPONDENTS.

Ship—Factory—Loading—Dangerous Process—Regulations of Secretary of State imposing obligations on ship-owner ultra vires—Factory and Workshop Act, 1901 (1 Ed. 7, c. 22), ss. 79, 88–104.

APPEAL from the judgment of the Court of Appeal, [1916] 2 I. R. 241, *sub nom. John Mackey v. James Henry Monks (Preston), Limited.*

A. J. Walter K.C., of the English Bar, and *O'Brien K.C.* and *M'Grath*, for the appellants.

Battersby K.C., *Gibson K.C.*, and *Swayne*, for the respondents.

The House of Lords by a majority (Lord Finlay L.C., Lord Atkinson, and Lord Parker of Waddington, Lord Parmoor and Lord Wrenbury dissenting) allowed the appeal, and directed judgment to be entered for the appellant.

Solicitor for the appellant: *Treasury Solicitor*, for *Treasury Solicitor in Ireland*.

Solicitor for respondents: *Beveridge & Co.*, for *J. Thornton & Son, Waterford*.

Appeal
1917.

IN RE CAVAN CO-OPERATIVE SOCIETY.

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CONTRACT—Reasonable time for Delivery—Custom—Delivery as required—Foreign Goods—Option to purchaser to select grades—Contract dependent on Vendor's contract with foreign producer—Country of origin of goods becoming Enemy Territory—Trading with Enemy—Vendor's contract with producers made illegal—Illegality of performance of Contract sued on—Reasonable time for completion—Repudiation by Vendor.] In a contract in writing for the sale and delivery "as required" of goods, of which the vendor is not producer, and which are known to both parties to be the spin of particular mills, where the purchaser has the choice of numerous varieties of the contract goods, a trade custom that delivery need not be made until a reasonable time to enable the vendor to obtain the goods from the particular mills has elapsed from the receipt of the purchaser's specification, is not an unreasonable custom; nor is such a custom repugnant to or inconsistent with the written terms of such a contract, being explanatory of what is the reasonable time for delivery. Such a contract must be read as incorporating the custom, and as made expressly in relation to the place of origin of the goods, and therefore as implying that the vendor can legally obtain the goods from the particular mill when the purchaser delivers to him his specification therefor. In this respect, where the vendor is not the manufacturer, the contract for sale and delivery is related to and dependent upon the vendor's contracts with the producers, and the legal possibility of the performance of such latter contracts. Where a contract for the sale and delivery of foreign goods is made between a British vendor and a British purchaser, and, during its continuance, the country where the goods are manufactured becomes enemy territory by hostile occupation, trading with persons in which is forbidden to British subjects by the laws of the realm, the vendor (if he has not the goods in his possession) may legally refuse to deliver on the ground that to obtain the specified goods is not then legally possible. Where a contract for sale and delivery "as required" of goods is silent as to time, the law will imply that the specification requiring delivery must be made

CONTRACT—continued.

within a reasonable time after the contract; also, that the contract must be completed within a reasonable time after specification, and such reasonable time for delivery may be explained and controlled by a trade custom or usage. Where a reasonable time for the completion of the contract has elapsed, and the country where the goods are produced is enemy territory trading with persons in which is illegal, the vendor may repudiate the contract without being obliged to offer delivery of the goods to the purchaser. *Jones v. Gibbons*, 10 Ex. 920, considered and distinguished. *Ross, Bros., Ltd., v. Shaw & Co.* - - K. B. D. 367

CONVICTION—Appeal—Sentence of detention in Reformatory School - - 45
See REFORMATORY SCHOOL.

— Indorsement on licence - - 437
See LICENSING ACTS—OFFENCES.

CO-OPERATIVE DAIRY SOCIETY—Husbandry - - - 594
See REVENUE—EXCESS PROFITS DUTY.

CO-OPERATIVE SOCIETY—Application for shares in before registration under Industrial and Provident Societies Act, 1893—Continuing offer - - 39
See INDUSTRIAL AND PROVIDENT SOCIETY.

— Rules prohibiting sale of milk by members to outside creameries - - 107
See RESTRAINT OF TRADE.

CORPUS DELICTI—Confession—Evidence of, in case of murder - - 557
See CRIMINAL LAW—EVIDENCE.

COURTS OF EMERGENCY POWERS 417
See BANKRUPTCY—DEBTOR SUMMONS.

CRIMINAL LAW—EVIDENCE—Murder—Confession—Corpus delicti—*Dead body not found—Onus of proof.*] On a trial for the murder of the infant illegitimate daughter of the accused evidence was given that he had directly confessed to the actual commission of the crime, but the dead body of the infant had not been found. The jury found the prisoner guilty. *Held*, that the judge (Gibson J.) had rightly refused to withdraw the case from the jury, that there was evidence upon which the prisoner could rightly be convicted, and that the conviction should be affirmed. In a charge of murder, by proof of the corpus delicti is meant proof of the factum of murder, and that the accused committed the murder or took part in its commission. Such proof may be established by the confession of the accused without proof of the finding of the dead body. The dictum of Sir Matthew Hale (*Pleas of the Crown*, 1778 ed., vol. ii, p. 290), that he "would never

CRIMINAL LAW—continued.

convict any person of murder or manslaughter unless the fact were proved to be done, or at least the body found dead," is not an inflexible legal maxim, but is a wise and necessary caution to be addressed by the presiding judge to the jury. Dictum of Palles C.B. in *Queen v. Sullivan* (20 L. R. Ir., at p. 570), that the case of murder is an exception to the general rule of the common law, and that the confession of the accused is insufficient of itself to prove that the fact was done, unless there is proof of the finding of the dead body, dissented from. *Rex v. McNicholl*. [Cr. Ca. R. 557]

CRIMINAL LAW—PRACTICE—Wreck—Receiver of Wreck—Right of Police to prosecute—Powers of Board of Trade.] The right to prosecute for taking possession of wreck, and unlawfully failing to deliver the same to the Receiver of Wreck under sect. 518 (b) of the Merchant Shipping Act, 1894 (57 & 58 Vict. c. 60), is not confined to the Board of Trade or their officers. An officer of police can prosecute in such a case without any authorization from the Board of Trade. *Dowling v. Griffin* - - 609

CUSTOM, reasonable—Delivery of goods as required - - - 367
See CONTRACT.

DAIRY CO-OPERATIVE SOCIETY—Business not "husbandry" - - 594
See REVENUE—EXCESS PROFITS DUTY.

DAMAGES—Liquidated—Agreed Sum payable on Breach of Agreement—*Proof of Debt—Costs.*] A company who were patentees of a mechanical apparatus for cash despatch in shops, sought to prove against the debtor for a sum of £30, and to remove their installation from the debtor's shop, relying upon an agreement whereby in effect, in consideration of the use of the apparatus, and of the installation, repair, and final removal of the same by the company; the debtor agreed to keep the apparatus for seven years certain, and to pay therefor a sum of £35 in annual instalments of £5, of which one instalment only had been paid prior to her arrangement. *Held*, that the sum payable upon breach of the agreement was liquidated damages and not a penalty, and that the proof should be allowed but without costs. The question of allowing costs of proof is in all cases a matter for the discretion of the judge. *In the Matter of O'B., a Debtor*, - - - K. B. D. (B) 354

DELIVERY "AS REQUIRED"—Reasonable time - - - 367
See CONTRACT.

DEPENDENCY—Partial—Parent - 446
See WORKMEN'S COMPENSATION. 3.

DESERTER—Absentee from military service 7

See MILITARY SERVICE.

"DISMISS"—Form of Order - - - 250

See JUSTICES—JURISDICTION (PETTY SESSIONS). 6.

EASEMENT — WATER—Right to draw Water from an enclosed Well—Dominant and Servient Tenement held under same Landlord—Demise—Reservation of "all Waters and Watercourses in or adjoining the demised premises"—Lost Grant—User—Trespass.] *A* and *B* were tenants of the same landlord. *A* held under a yearly tenancy, created on the determination in 1889 of a lease of 1851, which excepted to the lessor "all waters and watercourses in or adjoining the demised premises," with liberty to the lessor to turn and dispose of such waters and watercourses. *B* had held sixty-one acres as tenant from year to year. In 1884 he was ejected on notice to quit, twenty-one acres of his holding being demesne lands. After being out of possession for about eighteen months, *B* obtained a tenancy from year to year in forty acres of the original holding at a rent of £30, subsequently fixed, by fair rent order, at £21; and he later obtained a grazing letting of the remaining twenty-one acres at a rent of £21, subsequently reduced to £10. There was an enclosed well on *A*'s land, out of which some four or five families admittedly regularly took water, *B*'s family being amongst the number. To an action of trespass brought by *A*, *B* in his defence relied on a claim of right, founded on lost grant or alternatively upon a demise, to take water from the well on *A*'s land, and counterclaimed for interference by *A* with the exercise of the right claimed. The action and counterclaim were tried by Gibson J. without a jury. The plaintiff relied on evidence. *Held*, by the learned judge at the trial, that the reservation contained in the lease of 1851 did not include the water in the well, and that therefore the defendant *B* could not claim a right to the water by demise from the common landlord; that, owing to the break in *B*'s tenure, evidence of user prior to his new tenancy in 1886 was not admissible; that on the evidence the taking of water by the defendant from the well in question was permissive and not of right; that *B* had not proved facts from which a lost grant could be presumed, and that verdict and judgment should be given for *A* in the original action, and against *B* on the counterclaim. On motion by the defendant to set aside the verdict and judgment: *Held*, by the Divisional Court (Cherry L.C.J. and Boyd J.), 1, that, even assuming that the water in the well was included in the reservation in the lease of 1851, there was no evidence of a demise to *B* of a right to take water from the well; and 2, that even if evidence of user prior to 1886 was admitted,

EASEMENT—continued.

the learned judge at the trial had evidence upon which to found his findings of fact that the user proved was permissive, and that these findings, not being against the weight of evidence, the verdict and judgment entered for the plaintiff and against the defendant in the action must stand. On Appeal: *Held*, that on the true construction of the lease of 1851 the well, together with the waters therein, were excepted to the landlord, that the user of the well by the defendant was lawful under the permission of the landlord, and that the action ought to be dismissed. *Whelan v. Leonard* N.P., K.B.D., Apr. 322, 330, 333

ELECTION—By assignee in bankruptcy—Lease - - - - - 56
See BANKRUPTCY—PRACTICE.

EMERGENCY LEGISLATION—Mortgagee's action of ejectment - - - 231
See PRACTICE—COURTS (EMERGENCY POWERS). 2.

ENGLISH SOLICITOR—Retainer of Irish Solicitor by - - - 138, 144
See SOLICITOR—BILL OF COSTS. 2.

FACTORY—Workman detained—Doors locked during hours of employment - - 137
See FALSE IMPRISONMENT.

FALSE IMPRISONMENT—Workman in Factory—Hours of Employment—Quitting Work before end of day—Gate of Factory locked—Refusal of Employer to give Facilities for leaving Factory—*Volenti non fit injuria*.] Under sect. 150 of the Factory and Workshop Act, 1901, and the Defence of the Realm (Consolidation) Regulations, 1914, as amended by article 6 A of the Order in Council, 1915, the defendant, the owner of a factory, extended, with the sanction of the Home Secretary, the working hours in the factory by one half hour in the evening, and accordingly the period of employment ran from 6 a.m. to 6.30 p.m. A fortnight before the intended change was to have come into operation, notice to that effect was posted in the factory, and was seen by the plaintiff, one of the workers. The plaintiff gave no notice of his intention to leave the employment. During working hours the yard gate of the factory was always kept locked, and no worker could leave the premises during those hours without a pass. When the new regulations came into force, the defendant gave instructions that the yard gate was to be kept locked till 6.30 p.m. The plaintiff came to work as usual. He came out of the factory at 6 p.m., and demanded to be let out. The defendant refused to allow the gate to be opened, and the plaintiff was detained until 6.30 p.m. The plaintiff brought an action to recover damages for false imprisonment by the defendant. *Held*, that

FALSE IMPRISONMENT—*continued.*

it was a term of the employment, accepted by the plaintiff, that he should remain at work until 6.30 p.m.; that although the defendant might not be entitled to interfere actively to prevent his leaving before that time, he was not bound to afford facilities to him for doing so; and that the facts proved did not constitute false imprisonment.

Herd v. Weardale Steel, Coal, and Coke Company, Ltd., [1915] A. C. 67, applied. *Burns v. Johnston*

[APP. 137]

FELONY—Alleged as cause of action—No prosecution instituted - - - 534

See PRACTICE—STAYING PROCEEDINGS.

FISHERY—Erecting or making use of fixed engine—General conviction - - - 310

See JUSTICES—JURISDICTION (PETTY SESSIONS). 1.

FOREIGN GOODS—Country of origin becoming enemy territory - - - 367

See CONTRACT.

FRAUD—Particulars - - - 103

See PROBATE PRACTICE.

GAMING AND WAGERING—*Betting house*

—*Betting Act, 1853 (16 & 17 Vict. c. 119)*—

Game in which prizes are given for success, and in

which an entrance fee is required in advance—

Automatic machine—Case Stated—Case remitted to

Justices for further findings of fact—Duty of Justices.] The offences aimed at by the Betting Act,

1853 (16 & 17 Vict. c. 119), are offences in relation

to betting pure and simple, that is, transactions in

which none of the parties has any interest other

than the sum or stake he will win or lose. Where

a player is required to pay in advance an entrance

fee in order to be allowed to compete in a game in

which prizes are offered for success depending

upon the individual acts of the players in playing

the game, the possibility of winning such prizes

or of losing the entrance fee if unsuccessful is not

the sole consideration for the player's participation,

and the entrance fee so paid is not a deposit

"as consideration for an undertaking to give a

valuable thing upon a contingency relating to a

game" within sect. 1 of the Betting Act, 1853

(16 & 17 Vict. c. 119). *Peers v. Caldwell*; *Taylor*

v. Caldwell, [1916] 1 K. B. 371; and *R. v. Cald-*

well; *R. v. Brown*, [1917] W. N. 85, 12 Cr. App.

R. 210, discussed and not followed. Where on

appeal by case stated the Court remits the case to

the magistrates to enter continuances, and to find

further facts in answer to questions submitted by

the Court, the magistrates should give the parties

an opportunity of being re-heard, and, if they so

desire, of giving evidence in relation to the fact

required to be found. Where the magistrates,

without any re-hearing or fresh evidence, find in

GAMING AND WAGERING—*continued.*

answer to such questions, at a date long after the original hearing, merely from recollection, the Court may decline to act on such findings, and will certainly so decline, where, in so making such findings, the magistrates state that none of the matters on which the further findings were required was raised before them at the original hearing. *Forre v. M'Alister* - K. B. D. 387

GOOD BEHAVIOUR—Justices at Petty Sessions cannot estreat recognizance to be of

360

See JUSTICES—JURISDICTION (PETTY SESSIONS). 7.

HABEAS CORPUS—Appropriate remedy for person in military custody - - - 7

See MILITARY SERVICE.

HIGHWAY—Extraordinary traffic - - - 49

See LOCAL GOVERNMENT—ROADS.

HUSBANDRY—Co-operative Dairy Society—

Excess profits - - - 594

See REVENUE—EXCESS PROFITS DUTY.

ILLEGALITY of performance of contract—trading with the enemy - - - 367

See CONTRACT.

INDORSEMENT OF CONVICTION—Majority of justices - - - 437

See LICENSING ACTS—OFFENCES.

INDUSTRIAL AND PROVIDENT SOCIETY—

Application for Shares in Co-

operative Society before Registration—

Continuing Offer—Acceptance by Society after

Registration—Industrial and Provident Societies

Act, 1893 (56 & 57 Vict. c. 39).] An application

for shares made to the promoters of an unregistered

co-operative society is a continuing offer, which

may, if not revoked, be accepted by the society

when registered under the Industrial and Provi-

dent Societies Act, 1893 (56 & 57 Vict. c. 39);

and the promoters are the agents of the applicant

to communicate the offer to the society when so

registered. *Bridgetown Co-operative Society v.*

Whelan - - - C.B. APP., ROSS J. 32

INDUSTRIAL AND PROVIDENT SOCIETY—

Rules prohibiting sale of milk

to outside creameries - - - 107, 118

See RESTRAINT OF TRADE.

IRISH SOLICITOR—Undertaking professional

work in Ireland for English Solicitor—

Retainer - - - 138, 144

See SOLICITOR—BILL OF COSTS. 2.

JUDGMENT, Liberty to Execute—Promis-

sory note made after 4th August, 1914,

for previous debt - - - 43

See PRACTICE—COURTS (EMERGENCY

POWERS) ACTS. 1.

1. JUSTICES—JURISDICTION (PETTY SESSIONS)—*Certiorari—Uncertainty of Conviction—Offences charged disjunctively, and Conviction General—Fisheries (Ireland) Act, 1869 (32 & 33 Vict. c. 92), s. 16—“Erecting” or “making use of” a Fixed Engine.* A general conviction on a complaint which charges the defendant with “erecting” or “making use of” a fixed engine for the capture of salmon contrary to sect. 16 of the Fisheries (Ireland) Act, 1869 (32 & 33 Vict. c. 92), is bad for uncertainty, since “erecting” denotes an offence distinct from “making use of” under that Act and section, and, consequently, two separate offences are disjunctively charged, the conviction not stating of which offence the accused was convicted. *R. (Coyle) v. Tyrone Justices*, 42 I. L. T. R. 26, distinguished. *R. (White) v. County Cork Justices* K. B. D. 310

2. JUSTICES—JURISDICTION (PETTY SESSIONS) claim of title ousting jurisdiction—*Trespass, Summary Jurisdiction (Ir.) Act, 1851 (14 & 15 Vict. c. 92), s. 8—Claim to a right impossible in law.* Where a defendant to a summons seeks to justify the act complained of as done in exercise of a right which could not exist in law, he cannot have “fair and reasonable grounds for a bona fide claim of right,” and the justices should convict. Where a defendant so seeks to justify a trespass and the justices convict, their order, though bad in form, will not be quashed on certiorari, as the Court will in such case exercise its discretionary power, and refuse to make the order absolute. The prosecutor was convicted of trespass on the lands of *C.* He admitted the entry on the lands, but claimed it was made in exercise of a right of way. The right claimed was a public right of way from a public road across *C.’s* lands to a private bathing-place on the land of *R.*, *C.’s* neighbour. The justices stated in their order that the right claimed was not “substantially supported by evidence.” *Held*, that the right claimed being one impossible in law, the conviction was good; and, even if the justices’ order as made was bad in form, the Court in its discretion would not quash it on certiorari. *R. (O’Neill) v. Trustees of Tyrone* K. B. D. 96

3. JUSTICES—JURISDICTION (PETTY SESSIONS)—*Commencement of Prosecution—Conviction on first Summons quashed—Second Summons based on original complaint—Fisheries (Ireland) Act, 1856 (13 & 14 Vict. c. 88), s. 50.* The complaint made to the justices of an offence against sect. 16 of the Fisheries (Ireland) Act, 1869 (32 & 33 Vict. c. 92), and not the issuing of the summons, is the commencement of a prosecution under the Fisheries (Ireland) Acts. *Held* accordingly, that where the complaint was made within six months from the commission of the offence, the

JUSTICES—continued.

prosecution had been commenced within the time limited by sect. 50 of the Fisheries (Ireland) Act, 1850 (13 & 14 Vict. c. 88). *Beardley v. Giddings*, [1904] 1 K. B. 847, and *Brooks v. Bagshaw*, [1904] 2 K. B. 798, applied. *Held* also, that as a complaint had in fact been made to the justice before he issued one summons (which had been quashed), it was immaterial whether he had or had not present to his mind the existence of such complaint at the date when he issued a second summons. *R. (Futter) v. Co. Cork Justices* - - - K. B. D. 430

4. JUSTICES—JURISDICTION (PETTY SESSIONS)—*Court illegally constituted—Exclusion at adjourned hearing of a Justice not a member of the Bench before which the case began.* The rule laid down and applied in *R. (Department of Agriculture) v. Derry Justices*, ante, p. 283, namely, that where a case had been opened at petty sessions and is adjourned after the whole or a substantial part of the evidence has been taken, exclusive cognizance to hear and determine is vested in the justices before whom the proceedings were opened, is not affected where, to convenience a party, the evidence taken at the earlier stages is repeated at the adjourned hearing. Such a repetition, made for such purpose, does not make the adjourned hearing de novo so as to allow a justice, not a member of the Bench before whom the proceedings began, without the consent of such Bench, to hear and determine, and the exclusion of such justice from adjudication is not wrongful. The mere presence on the Bench, at an adjourned hearing of a part-heard case, of a justice not a member of the Bench having exclusive jurisdiction, not objected to until a late stage of the hearing, is not sufficient proof of assent by the justices having exclusive cognizance to the participation of such justice in the hearing. Positive proof is required of such assent. *R. (Dobbyn) v. Belfast Justices* - - - K. B. 297

5. JUSTICES—JURISDICTION (PETTY SESSIONS)—*Court improperly constituted—Adjudication on a part-heard case by a Justice not one of the Justices before whom the Case opened—Exclusive Jurisdiction of the Primary Court—Petty Sessions Act, 1851 (14 & 15 Vict. c. 93), sect. 20.* It is a general rule, governing all judicial procedure, recognized by statute and authority, that the judges before whom a case begins are the Court to complete the hearing and determination; and that whether there be an adjournment of the hearing or not, no judge other than the judge before whom the proceedings began can, without the consent of such latter judges, intervene to hear or adjudicate. The act of a judge so intervening without consent would be a manifest abuse of judicial powers. This rule is

JUSTICES—continued.

not altered or affected by the provisions as to adjournment contained in sect. 20 of the Petty Sessions (Ireland) Act, 1851 (14 & 15 Vict. c. 93); and where a case is opened at petty sessions, and, after the whole or a substantial part of the evidence has been taken, is adjourned (either generally to the next sessions, or in particular to a specific day, hour, or place), no justice other than those before whom the proceedings opened should, without the consent of such latter justices, intervene to hear or determine the case at the adjourned hearing. An adjudication by a justice so intervening in an adjourned hearing of a part-heard case without the consent of the original Bench can be quashed on certiorari as being made without or in excess of jurisdiction. Every adjournment of a hearing is a continuation of the hearing, and must be referred to the jurisdiction of the original Bench before which the case began. *R. (Department of Agriculture and Technical Instruction for Ireland) v. City of Londonderry Justices; R. (Meehan) v. Hardy* - - - K.B. 283

6. JUSTICES—JURISDICTION (PETTY SESSIONS) Form of Order—Dismiss—Case outside the Petty Sessions Act—Omission to state whether dismiss “without prejudice” or “on the merits”—Res judicata—Petty Sessions (Ireland) Act, 1851 (14 & 15 Vict. c. 93), ss. 21, 42—Game Act (27 Geo. 3, c. 35), s. 10.] The procedure laid down by sect. 21 of the Petty Sessions (Ireland) Act, 1851 (14 & 15 Vict. c. 93), is not obligatory in the case of a dismiss under the Game Act (27 Geo. 3, c. 35), and an order of the justices, made under that Act, stating that a charge is “dismissed,” without adding “on the merits” or “without prejudice,” is a good order, and a bar to subsequent proceedings for the same offence. *R. (Bridges and Ram) v. Armagh Justices*, [1897] 2 I.R. 236, considered. *R. (Walsh) v. Tipperary Justices* - - - K.B. 250

7. JUSTICES—JURISDICTION (PETTY SESSIONS)—Power to estreat a Recognizance to be of Good Behaviour—Conflict between enacting part of a Statute and Schedule thereto—Petty Sessions (Ireland) Act, 1851 (14 & 15 Vict. c. 93), ss. 34, 36, Schedule, Form (C).] Justices at Petty Sessions have no jurisdiction to estreat a recognizance to be of good behaviour. It is a cardinal principle of construction, that where there is a conflict between the forms given in a schedule to a statute and the enacting part of the statute, the forms must give way to the enacting part. *Shore v. Cunningham* - - - K.B.D. 360

JUSTICES—JURISDICTION (PETTY SESSIONS)—Absentee from military custody - - - **Z**
See **MILITARY SERVICE.**

LICENSING ACTS—LICENSING CERTIFICATE—Renewal of Licence—Certiorari—Householder's Certificate—Necessity for Personal Signature—3 & 4 Wm. 4, c. 68, s. 1; 37 & 38 Vict. c. 69, s. 14.] The certificate from householders as to the character and conduct of a publican's business required by sect. 1 of the Licensing (Ireland) Act, 1833 (3 & 4 Wm. 4, c. 68), is not an essential preliminary to the jurisdiction exercised by the justices under sect. 14 of the Licensing (Ireland) Act, 1874 (37 & 38 Vict. c. 69), in granting a certificate for the renewal of a licence. Hence, certiorari does not lie to quash the order and adjudication of the justices acting under sect. 14 of the Licensing (Ireland) Act, 1874, or the certificate granted by them for the renewal of the licence, merely because the certificate from the householders is informal or invalid. *Semble:* The certificate required by sect. 1 of the Licensing (Ireland) Act, 1833, must be personally signed by the six householders. *R. (Moore) v. Antrim Justices* - - - K.B.D. 347.

LICENSING ACTS—OFFENCES—Keeping Open—Justices—Record of Conviction—Procedure—Evidence—Indorsement of Conviction—Decision of Majority of Justices.] The King's Bench Division will not on an application for certiorari to quash a conviction, on the ground that the decision as recorded was not the decision of the Court, go behind the record of the conviction. Where out of a Court consisting of five justices, one justice only is recorded as dissenting from the decision of the Court, the King's Bench Division is bound by the record, and cannot receive evidence to prove that the decision of the Court as appearing by the record is not the decision of the majority of the justices. *Quære*, whether in a licensing prosecution, where a defendant is convicted of an offence which may be indorsed, all the justices, or the convicting justices only, ought to determine the question of indorsement. *R. (Carl) v. Justices of Tyrone* [K.B.D. 437]

1. LIMITATIONS, STATUTES OF—Contract with private individual—Public Authorities Protection Act, 1893 (56 & 57 Vict. c. 61), sect. 1 (a).] The defendants, who were a road authority, erected a stone-crusher near a quarry for the purpose of obtaining road materials. They hired *H.* and his mare to draw waggon-loads of stones from the quarry to the crusher, and while engaged in this work the mare was fatally injured. More than six months after the date of the accident *H.*'s administratrix commenced proceedings against the defendants to recover damages for the loss of the mare. *Held*, that the Public Authorities Protection Act, 1893, did not afford a defence to the proceedings: per Campbell C.J., because that Act does not extend to private duties or obligations

LIMITATIONS, STATUTES OF—*continued.*

arising out of contracts with particular individuals: per Madden J., because the Act does not apply to a case where it was at the option of the public authority either to make or to refuse to make the particular contract out of which the cause of action arose: per Gordon J., because the cause of action did not arise in the direct execution by the defendants of any statute, or in the discharge of a public duty owed by them to all the public alike, or in the discharge of a public authority exercised by them impartially with regard to all the public. *Sharphington v. Fulham Guardians*, [1904] 2 Ch. 449, and *Bradford Corporation v. Myers*, [1916] 1 A.C. 242, applied. *Hayes v. County Council of King's County* - - - K. B. D. 496

2. LIMITATIONS, STATUTES OF—**Public Body and its Officers**—*Public Authorities Protection Act*, 1893 (56 & 57 Vict. c. 61).—*Malicious Abuse of Authority—Conspiracy.*] In 1889 *N.* was appointed Inspector of National Schools at a progressive salary, "on the usual conditions," and to hold the position "during the pleasure of the Commissioners." Having been reprimanded on several occasions, he was deprived of increments of salary, suspended, and finally compelled to resign on a diminished retiring allowance. In an action brought by *N.* against *S.*, the Resident Commissioner of National Education, claiming damages for maliciously procuring and conspiring with others to procure the infliction on the plaintiff of alleged wrongs whereby his position and salary were prejudicially affected, and which finally resulted in his enforced retirement: *Held* by the Court of Appeal, affirming King's Bench Division, that the Commissioners of National Education were a public authority, that their officers had duties of a public nature to perform, and that the Commissioners and their subordinates in an action for torts alleged to have been committed by them in carrying out their duties, were entitled to rely upon the protection afforded by the Public Authorities Protection Act, 1893 (56 & 57 Vict. c. 61). *Held* also, that the Act applied to proceedings brought against a public authority by its subordinates. *Newell v. Starkie* K.B.D App. 73, 621

LOADING—Dangerous process - - 622
See SHIP—FACTORY.

LOCAL GOVERNMENT OFFICER—**Appointment and Salary of Officers of Rural District Councils**—*Control of the Local Government Board—Labourers (Ireland) Act*, 1886 (49 & 50 Vict. c. 59) — *Local Government (Ireland) Act*, 1898 (61 & 62 Vict. c. 37) — *Public Health (Ireland) Act*, 1878 (41 & 42 Vict. c. 52), s. 11.] The appointment and salary of all officers of rural district councils discharging

LOCAL GOVERNMENT OFFICER—*cont.*

the general business of those bodies, on the true construction of the Local Government (Ireland) Act, 1898 (61 & 62 Vict. c. 52), s. 11, and the Public Health (Ireland) Act, 1878 (41 & 42 Vict. c. 52), s. 11, are subject to the control and approval of the Local Government Board. *Rex (Landy and Others) v. Reddy* - - 477

LOCAL GOVERNMENT — AUDIT—**District Lunatic Asylums Accounts**—*Accounting Officer—Resident Medical Superintendent*—"Secretary or Clerk"—*Right to call upon to assist at Audit—Powers of Local Government Board and their Auditors in reference to Asylum Officers—Rule-making Authority—Function of Auditor—Local Government (Ireland) Act*, 1898 (61 & 62 Vict. c. 37), sect. 9, sub-s. 6, and sect. 108; *Local Government (Ireland) Act*, 1902 (2 Edw. 7, c. 38), sect. 22; *the Public Bodies Order*, 1904; *the Public Bodies Order*, 1915.] Pursuant to the Local Government (Ireland) Acts, 1898 to 1902, the Local Government Board on 5th February, 1915, made an order entitled "the Public Bodies Order, 1915," which provided that "the clerk or chief clerk of the Asylum Committee shall attend at the time and place appointed by the auditor for the audit of the accounts, and shall render to the said auditor all such assistance during the course of the audit as he, the said auditor, may from time to time require, whether by preparing returns, producing documents, calling back accounts, vouchers, or other documents, or otherwise as to the said auditor may seem requisite for facilitating or expediting the said audit." *Held* (affirming the King's Bench Division, *CHERRY L.C.J.* and *GIBSON J.*, *KENNY J.* dissenting), that the Resident Medical Superintendent was the person bound to perform the duties prescribed in so far as these duties were imposed upon "the secretary or clerk." *Held* also, that the rule-making authority for regulating the government of lunatic asylums and officers and servants thereof was the committee, with the approval of the Lord Lieutenant; that the Local Government Board had no statutory authority to impose duties on the officers of asylums, and that the Public Bodies Order, 1915, so far as it affected these officers, was ultra vires. *Held* further, that the audit of asylum accounts should be an independent investigation by the auditor himself, and that he had no power to delegate any part of his duties and functions to the accounting officer, or any other official whose accounts were being audited. *R. (Local Government Board and Cosgrave v. M'Loughlin* - - K. B. D. 174

LOCAL GOVERNMENT — AUDITOR—**Certiorari and Mandamus—Audit of Accounts**—*Certiorari inapplicable—Discretion.*] The func-

LOCAL GOVERNMENT—continued.

tion of an auditor in examining and passing the accounts of a District Asylum for the purpose of the capitation grant under sect. 58 of the Local Government (Ireland) Act, 1898 (61 & 62 Vict. c. 37), is ministerial or administrative, and not judicial. Such audit cannot be the subject of certiorari unless made so by statute. No writ of mandamus can issue to an auditor on such audit, as the auditor can neither be directed to revise the accounts in accordance with the applicant's interpretation of rights, nor be directed to hear and determine, as he has already done so. Where an auditor in such audit misunderstands or misapplies an enactment to the prejudice of some person interested in the audit, the proper remedy is a substantive action. Error in decision either on legal merits or on a statute cannot be reviewed on mandamus. *R. (O'Ferrall) v. Sheehan*, [1898] 2 I. R. 683; *R. (Wexford C. C.) v. L. G. B.*, [1902] 2 I. R. 349; *R. (Martin) v. Mahony*, [1910] 2 I. R. 695; considered and applied. *Rex (Clonmel Asylum Committee) v. Considine* [K. B. D. 1

LOCAL GOVERNMENT—RATES—Water

Rate—*Rural District Council—Absence of List or Applotment-book—Validity of Rate—Case Stated*—1 & 2 Vict. c. 56, sect. 65; 6 & 7 Vict. c. 92, sect. 10; 41 & 42 Vict. c. 52, sect. 66.] A Rural District Council in charging a water rate under the Public Health (Ireland) Act, 1878 (41 & 42 Vict. c. 52), sect. 66, is under no obligation, statutory or otherwise, to prepare a list or applotment-book such as is necessary to the valid charging of a poor rate, under the Poor Relief (Ireland) Act, 1838 (1 & 2 Vict. c. 56), sect. 65, repealed and replaced by the Poor Relief (Ireland) Act, 1843 (6 & 7 Vict. c. 92), sect. 10, and a water rate charged by a Rural District Council by a resolution only, without the preparation of such a list or book, may be a valid rate. *Rathdrum Rural District Council v. Saul*, 39 I. L. T. R. 270, considered. *North Dublin R. D. C. v. Walsh* - K. B. D. 86

LOCAL GOVERNMENT—ROADS—Extra-

ordinary Traffic—Repairs—Expenses—Excessive Weight—Public Roads (Ireland) Act, 1911 (1 & 2 Geo. 5, c. 5.)] Road authorities should have regard to modern requirements, and must make reasonable provision for motor traffic; a natural increase of volume in this mode of carriage, where its character is normal, does not amount to "extraordinary" traffic. What is "extraordinary" traffic on a post-road, on a part of which traction-engines are in use, considered. *Held*, that the obligation of County Councils to keep public roads in good condition and repair is absolute under section 82 of the Local Government (Ireland)

LOCAL GOVERNMENT—continued.

Act, 1898. *Londonderry County Council v. MacCarthur, Londonderry County Council v. Cormie*. [C.B. App. Gibson J. 49

LOST GRANT not presumed on facts - 323
See **EASEMENT, WATER**.

LUNATIC ASYLUM—Accounts; function of auditor - - - - 174
See **LOCAL GOVERNMENT AUDITOR**.

MILITARY CUSTODY - - - 7
See **MILITARY SERVICE**.

MILITARY SERVICE—Absentee from—

Habeas Corpus—Military Service Act, 1916 (5 & 6 Geo. 4, c. 104); *Army Act*, 1881 (44 & 45 Vict. c. 58); *Reserve Forces Act*, 1882 (45 & 46 Vict. c. 48)—*Jurisdiction of Justices to commit Deserter to Military Custody*.] To justify an order committing to military custody a person charged as a suspected deserter under the Army Act, 1881, c. 58, sect. 154, or charged as an absentee, being ordinarily resident in Great Britain on August 15, 1915, under 5 & 6 Geo. 5, c. 104, section 1, the Court of Summary Jurisdiction must be satisfied that such person is a deserter or is so ordinarily resident. It is not enough that, without being itself satisfied of such fact, the Court should decide that there was a prima facie case proper for the consideration and decision of another tribunal. *Held*, that an order committing to military custody a person charged as an absentee under 5 & 6 Geo. 5, c. 104, section 1, was invalid, as the Court did not decide that it was satisfied as to such person being ordinarily resident in Great Britain on August 15, 1915. *Held* also, that habeas corpus was an appropriate remedy for a person in military custody under such invalid order. *Quære*: (1) Whether an order committing to military custody can be made by a single magistrate under the Army Act, 1881, c. 58, sect. 154, or under 5 & 6 Geo. 5, c. 104, sect. 1; (2) as to the effect of an order committing to military custody in determining the status of the person charged; (3) as to the form of such order. *Walder v. Turner*, 33 T. L. R. I., and *Ferguson's Case* (unreported) discussed and distinguished. *Rex v. Jones* - - - - K. B. D. 7

MORTGAGE—Ejectment—Courts (Emergency Powers) Act - - - - 281
See **PRACTICE—COURTS (EMERGENCY POWERS)**.

MOTOR TRAFFIC—Public road, repair of—Extraordinary traffic - - - 49
See **LOCAL GOVERNMENT—ROADS**.

OPTION to purchaser to select grades of goods
See **CONTRACT**. [367

OWNER - - - - 268
See **REVENUE—INCREMENT VALUE DUTY**.

POLICY OF INSURANCE—*Resulting Trust*—*Policy taken out and premiums paid in the name of another.*] A policy of insurance was taken out by L. in the name of and on the life of J. L. paid the premiums, and retained possession of the policy, and dealt with it as his own property, J. never making any claim thereto. J. afterwards was adjudicated a bankrupt, and subsequently died. *Held*, that the policy moneys were payable to L., and not to J.'s assignees in bankruptcy. *In re John Slattery* - - K. B. D. (B.), Pim J. 278

POOR RATE—Obligation affecting lands 614
See **PRACTICE**—**SERVICE**.

1. PRACTICE—COURTS (EMERGENCY POWERS) ACT, 1914 (4 & 5 Geo. 5, c. 78)—*Liberty to execute Judgment—Action on foot of a Renewal Promissory Note made after 4th August, 1914, for a Debt incurred prior to that Date—Leave unnecessary.*] When the plaintiff obtains judgment in an action taken on foot of the dishonour of a Promissory Note after the 4th August, 1914, he is entitled to execute the judgment, without application for liberty to do so under s. 1 (1a) of the Courts (Emergency Powers) Act, 1914, 4 & 5 Geo. 5, c. 78, notwithstanding that the note sued upon is a renewal note given in respect of a debt incurred prior to the 4th of August, 1914. *Provincial Bank of Ireland v. O'Donnell* - - - K. B. D. 43

2. PRACTICE—COURTS (EMERGENCY POWERS) ACT, 1914 (4 & 5 Geo. 5, c. 78)—*Mortgagee's Action of Ejectment.*] The institution of an action of ejectment on the title by a mortgagee is not the realization of a security contemplated by sect. 1, sub-s. 1 (b), of the Courts (Emergency Powers) Act, 1914, but is only a step towards realization, and, consequently, leave need not be obtained before issuing the writ. *The National Bank, Ltd., v. Claffey* . . . K. B. 281

PRACTICE—PLEADING—Service—Solicitor withdrawing after Appearance—Personal Service of Statement of Claim.] Where a defendant's solicitor writes to the plaintiff's solicitor withdrawing from the case after appearance, the Court will deem personal service of the statement of claim upon the defendant good service for the purpose of enabling judgment to be marked, in default of defence. *Wall v. Carew* K. B. D. 94

PRACTICE—SECURITY FOR COSTS—Admiralty—Or. 59. rule 52.] In the case of a vessel registered as British, whose owner resides within the jurisdiction, an order for security for the costs of an appeal brought by the owner will not, in the absence of special circumstances, be made. *Schooner "B 1" v. Youghal U. D. C.*

[K. B. D (A) 315]

PRACTICE—SERVICE out of the Jurisdiction—Claim for poor rate, urban improvement rate, and sanitary rate—Obligation affecting land—Contract made or entered into within the jurisdiction—Order 11, r. 1, sub-ss. b and f.] The Killiney Urban District Council having applied, under Order 11, r. 1, of the Rules of the Supreme Court, for liberty to serve out of the jurisdiction a writ for the recovery of poor rate, urban improvement rate, and sanitary rate from the intended defendants: *Held* by the Court of Appeal, affirming the King's Bench Division, that the claim was not one either in respect of an obligation affecting lands or under an implied contract made or entered into within the jurisdiction, and that the application should be refused. *Killiney Urban District Council v. Kirkwood.*

[K. B. D. App. 614, 617]

PRACTICE—SET-OFF—Solicitor's Lien—Costs—Independent Proceedings in King's Bench Division and in King's Bench Division (Bankruptcy)—Jurisdiction to allow Set-off—R. S. C., 1906, Or. 65, rule 18.] The plaintiffs brought an action in the King's Bench Division against the defendant, and obtained judgment against him for £65 and costs £57 11s. 8d., making in all the sum of £122 11s. 8d. Subsequently the plaintiffs brought a debtor's summons in the King's Bench Division (Bankruptcy) claiming the said sum of £122 11s. 8d. The debtor's summons was dismissed, with costs amounting to £40 11s. 7d. On an application in the King's Bench Division (Bankruptcy) by the defendant's solicitors for a charging order on the said sum of £40 11s. 7d., and a cross-application by the plaintiffs asking for liberty to set-off the said sum of £40 11s. 7d. against an equal portion of the sum and costs recovered in the action:—*Held*, that the Court had a discretion to allow a set-off. *Held*, also, that the Court ought to allow the set-off, notwithstanding the defendant's solicitors' lien. *Reid v. Cupper*, [1915] 2 K. B. 147, and *Puddephatt v. Leith*, [1916] 2 Ch. 168, followed. *Young v. Mead.*

[K. B. D. 258]

PRACTICE—STAYING PROCEEDINGS—Cause of Action—Alleged felony—No Prosecution—Infant plaintiff.] In an action by an infant plaintiff, suing by her next friend, the statement of claim averred that "the defendant assaulted and beat the plaintiff, who then was an infant, under the age of sixteen years, and then and there had carnal knowledge of her." The defendant moved to stay proceedings on the ground that the only cause of action disclosed by the statement of claim was a felony, for which the defendant had not been prosecuted:—*Held*, by the Court of Appeal (affirming the King's Bench Division), that the

PRACTICE—continued.

statement of claim did not unequivocally or necessarily charge a felony, and that the Court, in the exercise of its discretion, ought not to stay proceedings. *Smith v. Selwyn*, [1914] 3 K. B. 98, distinguished. *Carlisle v. Orr*.

[K. B. D., App. 534, 540

PROBATE PRACTICE—Wills propounded alternatively by Reply—Fraud—Particulars

—*Suit to establish Will in Solemn Form.*] In an action brought by the executors to establish a will in solemn form of law, the defendant, a next-of-kin of the deceased, pleaded (inter alia) fraud on the part of the residuary legatee, and gave certain particulars. On the application of the plaintiffs, the defendant was ordered to give the best particulars he could of the times when, the places where, and the names and addresses of the persons in respect of whom certain misrepresentations and false and malicious statements by the residuary legatee were alleged to have been made, and the names of the persons who were said to have been refused admittance to the deceased's house, with liberty to the defendant up to fourteen days before the trial (but not later without leave) to furnish such further particulars as they might be advised. *Harley v. Russell* . . . K. B. D., PROB. 103

PROOF OF DEBT—Agreed sum payable on breach of agreement . . . 354
See DAMAGES.

PROSECUTION, commencement of . . . 430
See JUSTICES—JURISDICTION (PETTY SESSIONS). 3.

PUBLIC AUTHORITIES PROTECTION ACT . . . 73, 621, 496
See LIMITATIONS, STATUTES OF. 1, 2.

PUBLIC HEALTH ACTS—"Owner"—*Notice—Service on Receiver in minor matter—Abatement of Nuisance—Voluntary payment—"Imposition"—Lease—Covenant—Public Health (Ireland) Act, 1878 (41 & 42 Vict. c. 52), sects. 2, 110, 111, 112, 120.*] The defendant held from the plaintiff (who was a minor ward of Court) certain premises under a lease which contained a covenant to pay the rent "clear above all taxes, charges, and impositions whatsoever." A nuisance existed upon the premises comprised in the lease, and the sanitary authority served a statutory notice under the Public Health (Ireland) Act, 1878, upon D., the receiver over the minor's estate as "owner," calling for the abatement of the nuisance, and requiring certain works to be executed. The works were duly executed, and proceedings by civil bill were, with the leave of the Lord Chancellor, instituted in the name of the minor, as plaintiff,

PUBLIC HEALTH ACTS—continued.

to recover the expense from the defendant. *Held*, that D. was not the owner within sect. 2 of the Public Health (Ireland) Act, 1878; and that, therefore, there had been no service upon the owner of the notice prescribed by sect. 110 of the Act. *Corporation of Bacup v. Smith*, 44 Ch. D. 395, followed. *Held*, also, by Campbell C.J. and Madden J., that the works were done voluntarily, and not under compulsion of the statute, and that the expense incurred was not an "imposition" within the terms of the defendant's lease. *Hackett v. Smith* . . . K. B. D. 508

REASONABLE TIME for completion of contract—Trading with enemy . . . 367
See CONTRACT.

RECEIVER OF WRECK—Right of police to prosecute . . . 609
See CRIMINAL LAW—PRACTICE.

RECOGNIZANCE TO BE OF GOOD BEHAVIOUR—Justices at petty sessions cannot estreat . . . 360
See JUSTICES—JURISDICTION (PETTY SESSIONS). 7.

REFORMATORY SCHOOL—Detention in—*Mandamus—Conviction—Appeal—Dublin Police Act, 1837 (7 Wm. 4, and 1 Vict. c. 25), sect. 27—Summary Jurisdiction (Ireland) Act, 1861 (14 & 15 Vict. c. 92), sect. 23—Malicious Damage Act, 1861 (24 & 25 Vict. c. 97), sect. 76—Children Act, 1908 (8 Edw. 7, c. 67), sect. 57—Criminal Justice Administration Act, 1914 (4 & 5 Geo. 5, c. 58), sect. 43 (11).*] The right of Appeal given by sect. 43, sub-s. 11, of the Criminal Justice Administration Act, 1914 (4 & 5 Geo. 5, c. 58), is not limited to cases where a fine or imprisonment is imposed. An Appeal lies to Quarter Sessions from a conviction and sentence by a Dublin Police Magistrate imposing detention in a Reformatory under the provisions of the Children Act, 1908 (8 Edw. 7, c. 67), sect. 57. *Semble* sect. 43, sub-s. 11, of the Criminal Justice Administration Act, gives the same right of Appeal in Ireland as in England in all cases of summary jurisdiction. *Rea (Higgins) v. Justices of Dublin* . . . K. B. D. 45

RESERVATION—All waters and watercourses in or adjoining demised premises . . . 323
See EASEMENT—WATER.

RES JUDICATA . . . 250
See JUSTICES—JURISDICTION (PETTY SESSIONS). 6.

RESTRAINT OF TRADE—*Co-operative Creamery Society registered under the Industrial and Provident Societies Act, 1893—Rules—Member bound to supply all the milk of all his cows—Prohibition of competition—Public Policy—Breach of*

RESTRAINT OF TRADE—*continued.*

Contract — Damages.] Rules of a Co-operative Creamery Society registered under the Industrial and Provident Societies Act, 1893 (the shares being transferable only with the consent of the committee of the Society), bound the members not to sell the milk of their cows, produced within a certain defined area, "to any creamery other than a creamery of the society, or to any company, society, person, or persons who sell milk or manufacture butter for sale." *Held* by the Court of Appeal, affirming the decision of the King's Bench Division, not to amount to an illegal restraint of trade, nor to create such a monopoly as to offend against public policy. As a general rule, parties to a commercial agreement are free to enter into a combination to carry on a trade or business together for their own interest, provided such a course of action is undertaken without a view to injure others; and the law regards the parties as the best judges of what is reasonable as between themselves. Agreements regulating the relations of parties *inter se*, while members of a trading association or partnership, or during a contract of service, and imposing a restraint on individual trading, must be differentiated from restrictive covenants in the case of such persons after they have ceased to be members of the association or partnership, or have left the employment. Judgment of Holmes L.J. in *Tipperary Co-operative Creamery Society v. Hanley*, [1912] 2 I. R. 586, commented on. *Coolmoyno and Fethard Co-operative Creamery, Ltd. v. Bulfin*

[K. B. D. App. 107, 118]

RESULTING TRUST - - - - 278See **POLICY OF INSURANCE.****RETAIL TRADE** - - - - 236See **SHOP.**

REVENUE—EXCESS PROFITS—Exemption of "Husbandry"—*Finance (No. 2) Act, 1915 (5 & 6 Geo. 5, c. 89, ss. 38, 39, 45, Schedule 4, Part III., s. 10)*—*Registered Co-operative Dairy Society—Liability to excess profits duty.*] A co-operative society, registered under 56 & 57 Vict. c. 39, carrying on under its rules the manufacture and sale of butter in the interest of its members, who supplied milk for the purpose, is not carrying on the business of husbandry so as to be exempt under s. 39 of the *Finance (No. 2) Act, 1915 (5 & 6 Geo. 5, c. 89)*, from duty from excess profits, imposed by section 38 of that Act. *In re Cavan Central Co-operative Agricultural and Dairy Society, Ltd.* - - - - K.B.D. 594

REVENUE—INCREMENT VALUED DUTY—*Transfer of Land prior to making of Provisional Valuation—Owner of Land—Finance (1909-10) Act, 1910, ss. 1, 2, 4, 26, 27, 41 (10 Ed. 7, c. 8).*] It is no answer to a claim for

REVENUE—*continued.*

increment value duty arising on the occasion of a transfer on sale of an interest in land in pursuance of a contract after the commencement of the *Finance Act, 1910*, that no provisional valuation of the land had been made by the Commissioners of Inland Revenue prior to, or at the date of, the sale. In such a case it is the duty of the Commissioners, under sect. 27 of the Act, to serve notice of the provisional valuation on the owner of the land as defined by sect. 41 of the Act; not on the transferor, although the duty is assessable on the latter. *Attorney-General for Ireland v. Adams* [App. 268]

ROAD—PUBLIC—Repair of—Extraordinary traffic—Traction engine - - - 49
See **LOCAL GOVERNMENT—ROAD.**

RULES AND ORDERS—Or. XI, r. 1. - 614
See **PRACTICE—SERVICE.**

—Or. LIX, rule 52. - - - 315
See **PRACTICE—SECURITY FOR COSTS.**

—Or. LXVIII, r. 18 - - - 258
See **PRACTICE—SET-OFF.**

—Or. LXV, r. 19, 20, 64, - - - 618
See **SOLICITOR—BILL OF COSTS.**

RURAL DISTRICT COUNCIL—Appointment and salary of officers of - - - 477
See **LOCAL GOVERNMENT—OFFICER.**

SALVAGE—Admiralty—Submarine peril 406, 412
See **ADMIRALTY—SALVAGE.**

SANITARY RATE—Obligation affecting lands - - - 614
See **PRACTICE—SERVICE.**

SECURITY FOR COSTS—British vessel—Appeal by owner of - - - 315
See **PRACTICE—SECURITY FOR COSTS.**

SEDUCTION—Constructive Service of Child to Parent—Case for Jury—Loss of Service.] *A*, a minor daughter of *B*, was employed as a general servant by *C*. On account of an ailment, by arrangement with her mother, she was sent home for a week for treatment, and during that time was seduced. Having returned to her mistress *C*, the latter dismissed her on her pregnancy becoming apparent. *A* returned to her mother who, being in poor circumstances, subsequently sent her to the Union, in the Infirmary of which she was confined. *Held*, that during the week when *A* was seduced, she might be deemed to be in the service of her mother, *B*, and that the confinement in the Union was such an interference with *B*'s right to her service as to support the damage necessary to complete the cause of action. The authorities in reference to seduction where there may be two contemporaneous services considered. *Dent v. Maguire* - - - K.B.D. App. 59, 72

SERVICE, constructive—Child to parent—Con-temporaneous services - - - 59
See SEDUCTION.

— Personal—Of Statement of Claim—Where defendant's solicitor withdraws from case after appearance - - - 94
See PRACTICE—PLEADING.

— Notice under Public Health Acts - - - 508
See PUBLIC HEALTH ACTS.

SHARES—Application for in co-operative society before registration - - - 39
See INDUSTRIAL AND PROVIDENT SOCIETY.

SHIP—FACTORY—Factory and Workshop Act, 1901 (1 Ed. 7, c. 22), ss. 79, 88–104—*Loading—Dangerous Process—Regulations of Secretary of State imposing obligations on ship-owners ultra vires.* Decision of Court of Appeal in Ireland ([1916] 2 Ir. R. 200, 241) declaring regulations made by Home Secretary to be ultra vires, reversed by the House of Lords (Lord Finlay C., Lord Atkinson, and Lord Parker. Lord Parmoor and Lord Wrenbury dissenting). *Mackey, Appellant; Monks (Preston), Limited, Respondent.* H.L. 622

SHOP ASSISTANT - - - - - 236
See SHOP.

SHOP—Shop-assistant—Retail Trade—Coal Merchant—Branch Office—No Goods kept upon the Premises—Shops Act, 1912 (2 Geo. 5, c. 3), s. 19, sub-s. 1.] The word “shop” in sect. 19, sub-s. 1, of the Shops Act, 1912, has an extended and artificial meaning that goes beyond the popular and recognized meaning of the word. A coal merchant's branch office, in which no coal is kept and only orders are dealt with, is a “shop,” and the attendant in it, who takes the orders, is a “shop-assistant” within the meaning of that sub-section. *Wallace v. Dixon* - - - - K. B. D. 23

SIGNATURE—To householder's certificate for renewal of licence - - - - 347
See LICENSING ACTS—LICENSING CERTIFICATE.

1. SOLICITOR—BILL OF COSTS—Agreement to settle action on terms arranged by senior counsel—Issue of briefs by counsel before notice of trial or discovery—Consent to pay solicitor and client costs in action—Charges for briefs to counsel—Order 65, rules 19, 20, and 64.] The parties to action, after the pleadings had been closed, agreed to refer the settlement of the action to their respective senior counsel. *Held*, that the issue of briefs to senior and junior counsel was a reasonable mode of instructing them for the purpose of the settlement, and was not improper, although there had been no discovery obtained or notice of trial given. Charges for and in respect of such briefs and the fees thereon may be allowed on taxation as solicitor and client costs. *O'Connor v. Blain, Campbell & McLean, Ltd.* K.B.D. 618

2. SOLICITOR—BILL OF COSTS—Irish Solicitor undertaking Professional work in Ireland for English Solicitor—Retainer—Liability for Costs—Custom.] The personal liability of an English solicitor, at whose instance an Irish solicitor undertakes professional work in Ireland for an English client, depends in each case upon whether there is a contract express or implied that the Irish solicitor shall be entitled to recover his costs from the English solicitor. *K.*, an English solicitor, on behalf of an English client, instructed *P.*, an Irish solicitor, to take proceedings in the King's Bench Division in Ireland against *T. S.* of Dublin. At the trial of the action, without a jury, *Dodd J.* held a custom to be proved, that where an English solicitor instructs an Irish solicitor to take proceedings in an Irish court, the latter, in the absence of an express agreement contravening the custom, was entitled to recover from the instructing solicitor the entire outlay and two-thirds of the charges for professional services reasonably and properly incurred, and entered a verdict and judgment in favour of the plaintiffs accordingly. *Held*, by the Court of Appeal (Sir I. J. O'Brien C., *Ronan L.J.*, *Molony L.J. diss.*) (reversing the decision of the King's Bench Division, namely, that the plaintiff was estopped from alleging that the defendant was his client, and that the custom found by *Dodd J.* would be illegal and repugnant to the ordinary rules governing the relations between solicitor and client), that an express contract by the defendant to pay the plaintiff was established by the correspondence. *Held* also, that there is nothing inherently illegal in a contract by an English solicitor to pay for professional work carried out in Ireland by an Irish solicitor for an English client, and that a bill of costs for such work is taxable. *Porter v. Kirtlan*

[K. B. D. App. 138, 144]

SOLICITOR'S LIEN - - - - - 258
See PRACTICE—SET-OFF.

STATUTE—CONSTRUCTION OF—Variance between enacting part and schedule [360
See JUSTICES—JURISDICTION (PETTY SESSIONS). 7.

STATUTES—27 Geo. 3, c. 35—Game Act, s. 10 250
See JUSTICES—JURISDICTION (PETTY SESSIONS). 6.

— 3 & 4 Will. 4, c. 58, s. 1 - - - - 347
See LICENSING ACTS—LICENSING CERTIFICATE.

— 7 Will. 4 & 1 Vict. c. 25, s. 27—Dublin Police Act, 1837. - - - - - 15
See REFORMATORY SCHOOL.

— 1 & 2 Vict. c. 56, s. 65—Water rate - - - 86
See LOCAL GOVERNMENT—RATES.

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- 6 & 7 Vict. c. 92, s. 10—Water rate - 86
See LOCAL GOVERNMENT—RATES.
- 13 & 14 Vict. c. 88—Fisheries (Ir.) Act, 1850
— Commencement of Prosecution - 430
See JUSTICES—JURISDICTION—PETTY SESSIONS. 3.
- 14 & 15 Vict. c. 92, s. 8—Claim of Title ousting Jurisdiction - - - 96
See JUSTICES—JURISDICTION (PETTY SESSIONS). 2.
- 14 & 15 Vict. c. 92, s. 23—Summary Jurisdiction (Ir.) - - - 45
See REFORMATORY SCHOOL.
- 14 & 15 Vict. c. 93, s. 20 - - - 283
See JUSTICES—JURISDICTION (PETTY SESSIONS). 5.
- 14 & 15 Vict. c. 93—PETTY SESSIONS Act, 1851, ss. 34, 36 - - - 360
See JUSTICES—JURISDICTION (PETTY SESSIONS). 7.
- 14 & 15 Vict. c. 93 Petty Sessions (Ir.) Act, 1851, ss. 21, 42 - - - 250
See JUSTICES—JURISDICTION (PETTY SESSIONS). 6.
- 16 & 17 Vict. c. 119—Betting Act, 1853—Automatic Machine, - - - 387
See GAMING AND WAGERING.
- 17 & 18 Vict. c. 103—Towns Improvement Act, 1854, Town, Existence and Extent of - - - 454
See TOWN.
- 20 & 21 Vict. c. 60, s. 271—Bankruptcy 56
See BANKRUPTCY—PRACTICE. 2.
- 20 & 21 Vict. c. 60, s. 385—Bankruptcy. 28
See BANKRUPTCY—PRACTICE. 1.
- 24 & 25 Vict. c. 97, s. 76—Malicious Damage Act, 1861 - - - 45
See REFORMATORY SCHOOL.
- 32 & 33 Vict. c. 92—Fisheries (Ir.) Act, 1869, s. 16 - - - 310
See JUSTICES—JURISDICTION (PETTY SESSIONS). 1.
- 37 & 38 Vict. c. 69, s. 14 - - - 347
See LICENSING ACTS.—LICENSING CERTIFICATE.
- 41 & 42 Vict. c. 52—Public Health (Ir.) Act, 1878, s. 11—Appointment and Salary of Officers of Rural District Council - - - 477
See LOCAL GOVERNMENT OFFICER.
- 41 & 42 Vict. c. 52—Public Health Act, 1878, ss. 110, 111, 112, 120 - - - 508
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TOWN—Existence and extent of—*Order of Local Government Board defining Boundaries—Certiorari inapplicable—Towns Improvement (Ireland) Act, 1854 (17 & 18 Vict. c. 103).* Where a town seeks to adopt the provisions of the Towns Improvement (Ireland) Act, 1854 (17 & 18 Vict. c. 103), and the town at the date of the application had no defined boundaries, such town must have at least 1500 inhabitants according to the last census returns. The existence and extent of such town are matters of fact to be determined by the Local Government Board on such application. The unit selected by the census enumerator as a "town" is not necessarily the town as it actually exists, and is not the standard by which the existence and extent of the town under the Act are to be ascertained. The order of the Local Government Board finally approving of the adoption of the Towns Improvement (Ireland) Act, 1854

TOWN—continued.

(17 & 18 Vict. c. 103), being made final and conclusive proof for all purposes by sect. 15 of that statute, cannot be quashed on certiorari. So held by the King's Bench Division and the Court of Appeal. *R. (Dizon) v. L. G. B.*, 2 L. R. Ir. 316, over-ruled; *R. (Eustace) v. L. G. B.*, 44 I. L. T. R. 176, applied. *Rez (North Dublin Rural Council) v. Local Government Board* - - - 454-476

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**1. WORKMEN'S COMPENSATION—Con-
 tract of Service—Control—Expert well-sinker
 —Workmen's Compensation Act, 1906 (6 Ed. 7,
 c. 58), s. 13.]** The applicant, who held himself
 out to the public as an expert well-sinker,
 entered into an agreement with the respondent
 to sink a well for him. All the tackle was

WORKMEN'S COMPENSATION—continued.

supplied by the applicant, who during the course of the operations was in no way subject to the control of the respondent. The applicant was paid 8s. a day in addition to his board, and he employed an assistant to whom he paid 3s. a day. Having met with an accident at the work, the applicant claimed compensation. The County Court Judge found that there was no contract of service between the applicant and the respondent. *Held*, that as a matter of law the Court was not bound, on the evidence, to find that the applicant was a servant of the respondent. *Hughes v. Quinn* - - - - APP. 442

2. WORKMEN'S COMPENSATION—Onus

of Proof—Compensation—Accident—Disappearance of Seaman—No direct Evidence—Workmen's Compensation Act, 1906 (6 Ed. 7, c. 58), sect. 1, sub-s. 1.] A seaman disappeared during his spell of duty at the wheel in the wheel-house in the centre of the flying-deck, and was not afterwards seen. The night was rough, the sea choppy, but the vessel was steady. The flying-deck was protected by a railing. There was no direct evidence as to how the man came by his death, and, in spite of the presumption against suicide, the County Court Judge was unable to draw the inference that the death was due to an accident; and he found as a fact that the death was not the result of an accident arising out of and in the course of the deceased's employment. *Held*, that the finding of the County Court Judge simply

WORKMEN'S COMPENSATION—continued.

meant that the onus of proof on the applicant for compensation had not been discharged, and that in the circumstances his conclusion was right. *Rourke & Co. v. Holt* - - - - APP. 318

3. WORKMEN'S COMPENSATION—Partial

Dependency—Claim by Parent—Amount of Assessment—Services rendered by deceased to Applicant.] A boy of fourteen years of age was fatally injured by an accident arising out of and in the course of his employment. He was employed during four months of the year at the rate of 7s. a week plus his dinner and tea, and he handed over all his earnings to his mother, the applicant, who was a small farmer. The County Court Judge found that the mother and brothers and sisters of the deceased were partially dependent on him, and he awarded £100 compensation to be apportioned amongst them. *Held*, that at the time of the accident there was partial dependency; that the Court was not precluded by law from taking into consideration the custom of the country that boys of the age of deceased usually assisted in farm work on their parents' holdings; and that so long as the County Court Judge had given an amount within the maximum, the Court of Appeal had no right to inquire into the quantum of the award. *Healy v. Reilly* - - - - APP. 446

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